Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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December 17, 1979

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioners* respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 18, 1979.

OPINION BELOW

The Opinion of the Court of Appeals, reported at 605 F.2d 710 (3rd Cir. 1979), appears in the Appendix hereto. The

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*The other Petitioners are as follows: Walton H. Simpson, William H. Davis, William G. Dix, Edward W. Hagemeyer, James C. Hardcastle, Delma Lafferty, James H. Williams, William S. Young, Burt C. Pratt, Luna I. Mishoe, Pierre S. duPont, IV, M. Milford Caldwell, George W. McLaughlin, Romeo C. Henderson, Harriet R. Williams, Arthur E. Bragg, Ora Bunch, Ehsan Helmy, Vera Powell, John R. Price, Herbert Thompson, W. Richard Wynder, Ulysses Washington, and Jane Laskaris. M. Milford Caldwell died on October 27, 1979.

Opinion rendered by the District Court on August 30, 1978 and the Memorandum Opinion rendered by the District Court pursuant to Respondent's Motion for Reconsideration on October 16, 1978 were not reported. These opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 18, 1979. This petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the time limitation requirements of 42 U.S.C. §2000e-5(e) were complied with in this matter though no unlawful employment practices were alleged to have occurred within 180 days of the filing of a charge with the Equal Employment Opportunity Commission.

2. Whether the effects of a decision to deny an employee a tenure position can constitute a continuing violation relieving one of the requirements to file a charge of discrimination within 180 days of the decision.

3. Whether, for the purposes of applying the applicable statute of limitations, a cause of action alleging a discriminatory decision to deny tenure accrues at the time such a decision is made and communicated for a claim under 42 U.S.C. §1981.

4. Whether, as an alternative ground for affirming the dismissal of a 42 U.S.C. §1981 action, such an action should be dismissed for failing to state a cognizable claim when the claim is solely based on alleged national origin discrimination.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 2000e-5(e), Page 1241 (1976 Ed.). Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local authority.

A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charges made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the state or local agency.

United States Code, Title 42:

> Section 1981, Page 1216 (1976 Ed.), Equal Rights Under the Law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Respondent, Columbus B. Ricks, a black male Liberian filed an action against the Petitioners, Delaware State College and the individuals, who are officials and employees of the College, claiming employment discrimination on the basis of national origin. Respondent invoked the jurisdiction of the District Court on the basis of 42 U.S.C. §2000e et seq., and 28 U.S.C. §§1331 and 1343(3) and

(4). Respondent was employed by Delaware State College ("the College") from September, 1970 through June, 1975 on a series of one academic year contracts. In February, 1973, he was denied academic tenure but was offered another one year contract. In February 1974, the College's Committee on Promotions and Tenure reviewed the Respondent's status again, and again recommended that Respondent be refused tenure. The College's Board of Trustees met on March 13, 1974 and accepted the Committee's recommendation. Respondent was informed that he had been denied tenure, and in April of 1974, Respondent filed a grievance concerning the decision to deny him tenure with the Educational Policy Committee of the College. In May 1974, this committee conducted a hearing concerning Respondent's grievance. The committee determined that the Respondent's grievance

should be denied and that the decision to deny Respondent tenure should remain unchanged. Respondent has not alleged that the decision of the Educational Policy Committee or the actions of its members pertaining to its decision were in any way discriminatory or unlawful. The decision of the Educational Policy Committee was accepted by the Board of Trustees, and conveyed to Respondent by letter of September 12, 1974.

In June, 1974, the Board of Trustees notified Ricks that on the basis of their decision to deny him tenure and in accordance with the policies of Delaware State College, he would be offered a terminal contract for the school year that ran from September 1, 1974 to June 30, 1975. Respondent accepted this terminal year contract. On April 4, 1975, Respondent filed a charge of employment discrimination with the Equal Employment

Opportunity Commission (EEOC). On June 30, 1975, Respondent's terminal year contract with the College expired.

On July 6, 1977, Respondent received a right to sue letter from the EEOC and filed a six count complaint in the District Court on September 9, 1977. The District Court dismissed all counts as being untimely filed. Respondent appealed only the dismissal of his claims based upon 42 U.S.C. §2000e, et seq., and 42 U.S.C. §1981. The Court of Appeals reversed the District Court dismissals as to both of these claims on the basis that the unlawful employment practice of the Petitioners occurred on June 30, 1975 when Respondent's terminal one year contract expired. The Court of Appeals further held that the duration of the terminal one year contract was a part of the decision to deny tenure with the legal effect that

the decision to deny tenure amounted to a continuing violation of 42 U.S.C. §2000e, et seq. (Title VII) through June 30, 1975. The Court further held that any filing made during this time period from the denial of tenure to June 30, 1975 was timely. See Appendix p. 15a.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF 42 U.S.C. §2000e-5(e).

Section 2000e-5(e) of Title 42 provides that "a charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred . . .". The Third Circuit determined that the alleged unlawful denial of tenure did not occur at the time that the decision was made by the College, but rather occurred when his terminal year

contract expired. In so holding, the Third Circuit has determined that an unlawful employment practice occurs not at the time that such action is done, but rather, at the time that the effects of such actions are realized.

This holding is in direct conflict with the holding of the Ninth Circuit in Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979). In an almost identical factual situation, the Ninth Circuit rejected the position that the effects of a decision to deny tenure constitute the time of its occurrence rather than when the decision is actually made. In Abramson, the Court of Appeals was also concerned with a claim of discriminatory action in denying one a tenured position. That claimant, after being advised that tenure had been denied, was offered a terminal one year contract in accordance with the College personnel

policies. In order to bring the College's actions within the scope of Title VII, the Plaintiff claimed that the termination date for the terminal contract constitute time when the denial of tenure occurred.

The Ninth Circuit specifically rejected this argument at page 209 where it stated that:

> In this case, appellant was employed under a series of one-year contracts, none of which at the time of the June, 1971 decision (to deny tenure) extended Appellant's employment to or beyond March 24, 1972. Nevertheless, the University was obligated upon the June, 1971 decision to offer her a terminal year. It could be argued therefore, that, inasmuch as the consequences of the tenure denial extended at least until the expiration of the terminal year, Appellant has a Title VII cause of action. We believe, however, that the Pennsylvania District Courts misdirected their attention. The proper focus is upon the time of the discriminatory acts, not upon time at which the consequences of the acts became most painful. Liability of the Appellees must be premises on discriminatory

> action taken by them on or after March 24, 1972, if the tenure decision was final prior to that date, and no other discriminatory action took place thereafter, Appellant's action was properly dismissed.

Thus, the applicable law as determined by the Ninth Circuit is in direct conflict with the Third Circuit's decision in this matter. Moreover, in the present matter, there are no allegations that the policies or informal procedures of the College take place during the terminal year.* Additionally, Respondent, as noted by the District Court, failed to identify any alleged discriminatory action that took place within a 180 day period prior

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*It was on the basis of this additional allegation that the Ninth Circuit reversed the lower court's granting of summary judgment as there appeared to be material issues of fact in dispute concerning these allegations. This is not the case in the present matter, as there are no such allegations and Respondent admits no actions were unlawfully committed during the 180 days prior to the date of filing a charge with the EEOC. See Appendix p. 28a.

to April 4, 1975 when his Title VII complaint was filed. The conflict between these two decisions is further emphasized by this Court's holding in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). In Evans this Court held that an act which is not the subject of a timely filing pursuant to 42 U.S.C. §2000e-5(e) is the legal equivalent of an act done prior to the enactment of Title VII.

Other Courts of Appeals have also rejected the Third Circuit's analysis of determining the occurrence of an unlawful employment practice as of the time that its effects arise rather than at the time that the action is taken. The Eighth Circuit denied relief for the effects of a time-barred discriminatory act in Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978). The Fifth Circuit has held that practices and actions of an employer which do not occur

within the 180 days immediately prior to the date that the grieved party files his charge with the EEOC are barred as untimely. The Court also rejected the "continuing violation" analysis, Bracamontes v. Amstar Corp., 576 F.2d 61 (5th Cir. 1978). See, also, Martin v. Georgia-Pacific Corporation, 568 F.2d 58 (8th Cir. 1977); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977); and Masco v. United Airlines, 574 F.2d 1127 (3rd Cir. 1978).

2. THE DECISION BELOW MISINTERPRETS AND FAILS TO APPLY THE RULE OF THIS COURT AS FORMULATED IN UNITED AIR LINES, INC. V. EVANS, SUPRA, REGARDING 42 U.S.C. §2000e-5(e).

The Third Circuit held that it was not bound by the holding of this Court in United Airlines v. Evans, supra, on the

basis that Evans applies only to situations involving actual terminations and some subsequent action, see, Appendix, p. 14A, 15A. However, there is nothing in this Court's opinion to indicate that the precedential value of Evans is limited only to unlawful terminations rather than other unlawful employment practices deemed to be within the scope of 42 U.S.C. §2000e-2.

Specifically, this Court noted at page 558 that:

> A discriminatory act which has not been made the basis for a timely charge is the legal equivalent of a discriminatory act which occurs before the statute has passed. It may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present consequences.

Simply put, the Respondent must show the occurrence of an unlawful employment

practice within 180 days of the date that he filed his charge with the EEOC. Respondent has failed to identify any occurrence that transpired between October 7, 1974 and April 4, 1975 regarding the College's decision to deny Respondent tenure. Thus, that decision, as required by the holding in Evans, which occurred prior to October 7, 1974, serves no legal basis for a Title VII claim.

Additionally, the Third Circuit held that the denial of tenure constituted a continuing violation. However, Evans states that the Respondent must show that a present violation exists. Respondent has not shown the existence of any violation that occurred within 180 days of the date of his filing. Thus, the Third Circuit's analysis and holding erred in disregarding this Court's holding in Evans. This misinterpretation of Evans

and failure to apply it to the present situation justifies the grant of certiorari to review the judgment below.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF THE APPROPRIATE STATUTE OF LIMITATIONS TO A 42 U.S.C. §1981 ACTION.

Concerning Respondent's 42 U.S.C. §1981 claim, the Third Circuit simply determined that since it would use the June 1975 date for purposes of Title VII, the same date would also be applicable to the §1981 action. Thus, the Third Circuit determined that a cause of action alleging discriminatory practices in the denial of tenure accrues not at the time that those alleged actions are taken and communicated to Respondent but rather, at the time that the employment relationship ceases. This determination by the Third Circuit conflicts with this Court's recent statements

concerning the application of statute of limitations, United States v. Kubrick, Case No. 78-1014, 48 U.S.L.W. 4030 (11-27-79).

In Kubrick, this Court noted that generally a statute of limitations begins to run at the time of injury, and certainly not later than when the person is aware of his injury and its probable cause. Further, this Court cited with approval the case of Urie v. Thompson, 337 U.S. 163 (1949). There, this Court noted that the traditional purposes of statute of limitations required one to take action within a specific period of time after notice of the invasion of one's legal rights. In the present matter, the alleged invasion of Plaintiff's legal rights occurred when the Petitioners allegedly discriminatorily denied Respondent tenure. Thus, the holdings of this Court are in conflict with the Third

Circuit's determination that the act of denying tenure does not cause the statute of limitations to begin on this claim, but rather only when the last effect of that decision has occurred does the statute of limitations begin.

Additionally, the Third Circuit's determination conflicts with the holding in Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979). In Bernard, the Fifth Circuit noted the following in applying the applicable statute of limitations to a §1981 claim at page 1255 where it is stated that:

> Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the last date on which Defendants improperly harmed Plaintiffs. . . . Recovery is limited to those violations occurring within the two year period* immediately

*The Court determined that the applicable state statute in Bernard for this §1981 action was the Texas two year statute of limitations. It is undisputed in the present matter that the applicable statute of limitations is the general three year statute, 10 Del. C. §8106.

preceding the filing of the complaint or thereafter.

Since there is no allegation that the use of terminal year contracts in the present matter involved discriminatory acts by the Petitioners, the only identifiable discriminatory acts involve the denial of tenure which occurred in June, 1974. Since suit was not filed until September, 1977, a determination of when such an action accrued in accordance with the decisions of this Court and the Fifth Circuit require a finding that this §1981 action is time-barred.

4. THE DECISION BELOW FAILED TO AFFIRM THE TRIAL COURT DISMISSAL OF THE 42 U.S.C. §1981 ACTION ON THE ALTERNATIVE BASIS THAT A CLAIM OF NATIONAL ORIGIN DISCRIMINATION FAILS TO STATE A COGNIZABLE CLAIM UNDER THIS STATUTE.

Petitioners sought the dismissal of the 42 U.S.C. §1981 action in the District

Court on two grounds. Petitioners maintained that this action was barred by the applicable statute of limitations and that it failed to state a cause of action on the basis that an allegation of national origin discrimination is not a cognizable claim for relief under 42 U.S.C. §1981. The dismissal of the §1981 action by the District Court was on the basis that the action was barred by the applicable statute of limitations. See Appendix, Page 36a.

Petitioners further sought the affirmance of the District Court dismissal of this action before the Third Circuit on the basis that it was barred by the applicable statute of limitations and that it did not afford relief for alleged national origin discrimination. The Third Circuit refused to consider the alternative basis that national origin discrimination is not protected by 42 U.S.C.

§1981 for the purpose of affirming the lower court. Such consideration of an alternative basis has been approved by this Court. California Bankers Assn. v. Shultz, 416 U.S. 21, 71 (1974). On the basis of the approval that this Court noted in California Bankers Assn. for upholding and affirming lower court decisions on alternative basis, Petitioners request that this Court determine whether the District Court dismissal of the 1981 action can be affirmed on the basis that this statute does not afford protection for alleged national origin discrimination claims.

The District of Columbia Circuit has held that §1981 does not protect alleged national origin discrimination, Kurlyas v. U.S. Department of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974) aff'd without opinion, 514 F.2d 894 (D.C. Cir. 1975); See, also, Manganares v. Safeway Stores,

Inc., 593 F.2d 968 (10th Cir. 1979); Plummer v. Chicago Journeymen Plumbers, etc., 452 F. Supp. 1127 (N.D. Ill. 1978); Saad v. Burns Inter. Sec. Services, Inc., 456 F. Supp. 33 (D.D.C. 1978). Moreover, as this issue raises a significant and recurring problem concerning the scope of protection afforded by 42 U.S.C. §1981, this Court should decide this issue, as it has not directly decided it to date. Cf. McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully Submitted,

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December 17, 1979

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NO. _____

DELAWARE STATE COLLEGE, et al.,

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COLUMBUS B. RICKS,

Respondent.

PETITIONERS' APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2565

COLUMBUS B. RICKS,

Appellant

v.

DELAWARE STATE COLLEGE, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 77-0342)

Submitted Under Third Circuit Rule 12(6)
July 10, 1979

Before: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges.

(Opinion filed September 18, 1979)

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OPINION OF THE COURT

A. Leon Higginbotham, Jr., Circuit Judge.

Appellant Columbus B. Ricks has brought suit challenging his denial of tenure. The district court dismissed his claims as being untimely. Ricks has challenged the dismissal of two of those claims alleging violations of Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. We agree with Ricks that the dismissal of these claims was improper and we will, therefore, reverse and remand for further proceedings.

I. THE FACTS AND PROCEDURAL HISTORY

Ricks, a black male Liberian, was employed by Delaware State College (the College) from 1970 to 1975 as a Professor of Education and Coordinator of Science Education. In February, 1973, he was denied academic tenure, but was given another one year contract. In February, 1974, the College's Committee on Promotions and Tenure again recommended that Ricks be refused tenure. The College's Board of Trustees met on March 13, 1974 and accepted that recommendation. In April, 1974, Ricks filed a grievance with the Education Policy Committee of the College. In May, 1974,

this committee, after conducting a hearing, determined that the denial of tenure was proper. In June, 1974, the Board of Trustees notified Ricks that he was being given a terminal contract for the school year that ran from September 1, 1974 to June 30, 1975. His employment with the college ceased on the latter date. On April 4, 1975, Ricks filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). On July 6, 1977, Ricks was sent a right to sue letter by the EEOC. On September 9, 1977, he filed a six-count complaint, alleging, inter alia, that he had been discriminated against on the basis of national origin in violation of Title VII and §1981. The Title VII claim was dismissed for failing to file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred" as required

by 42 U.S.C. §2000e-5(e). The Section 1981 claim was dismissed as barred by the applicable statute of limitations. The other claims were also dismissed as untimely. On appeal, Ricks challenges only the dismissal of the Title VII and §1981 claims.

II. THE TITLE VII CLAIM

42 U.S.C. §2000e-5(e) requires that "[a] charge under this section be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...." The issue here is: From what date does this 180-day period run? Appellees argue and the court below concluded that it runs from no later than June, 1974 when Ricks was awarded his terminal one year contract. Ricks argues that it runs from June 30, 1975 when his contract actually expired and when he discontinued his services to the college.

In Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1977), cert.

denied, 99 S. Ct. 87 (1979), this court faced a similar question in the context of a suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq. In Bonham, the employee was notified on October 31, 1975, that he would be terminated as of December 31, 1975, but rendered no services after October 31, 1975. Like Title VII, the ADEA requires that a charge be filed "within 180 days after the alleged unlawful practice occurred." 20 U.S.C. §626(d). The court in holding that the 180-day period began to run from the earlier date, made it clear that its decision was based on a two-part test:

> The 180-day period does not begin to run until the employee knows, or as a reasonable person should know, that the employer has made a final decision to terminate him, and the employee ceases to render further

> services to the employer. Until that time he may have reason to believe that his status as an employee has not finally been determined, and should be given an opportunity to resolve any difficulty while he continues to work for the employer. In any event, a terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination against his employer as long as he is still working, even though he has been told of the employer's present intention to terminate him in the future.

569 F.2d at 192 (emphasis supplied).

Given the identical wording of Title VII's and the ADEA's 180-day requirements, and the common humanitarian and remedial purpose of the two statutes, we perceive no reason to interpret the two require-

ments differently in this regard. See Oscar Mayer & Co. v. Evans, 99 S. Ct. 2066 (1979) (Section 14(b) of the ADEA, 29 U.S.C. §633(b), construed as having the same meaning as Section 706(b) of Title VII., 42 U.S.C. §2000e-5(c); Hart v. J. T. Baker Chemical Co., 598 F.2d 829 (3d Cir. 1979).[1]

1. In Hart we specifically recognized that the reasoning of Bonham is, in large measure, applicable in interpreting Title VII. 598 F.2d at 831-32. We referred there to this court's decision in Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (in banc), which held that the procedural requirements of the ADEA could not, in all respects, be considered analogous to those in Title VII. The Supreme Court, in Oscar Mayer & Co., however, overruled our holding in Holliday and explicitly relied on Title VII in construing the procedural requirements of the ADEA.

The Second Circuit has reached essentially the same conclusion on the basis of similar facts. In Egelston v. State University College at Genesco, 535 F.2d 752 (2d Cir. 1976), the court held that Title VII's time limit runs from when the plaintiff left the university or possibly from when a replacement was hired, not from when the plaintiff was notified that her contract would not be renewed. Also, see Noble v. University of Rochester, 535, F.2d 756 (2d Cir. 1976) (Time runs on a claim of discriminatory promotion from when the person actually promoted assumes his duties, not from when that person assumed the title, but was unable to fully perform his new duties.)

The considerations supporting the results in Bonham and Egelston apply to this case as well. Although the tenure process is portrayed by appellees as a

fixed and unchanging one, even a casual review of the cases in this area reveals instances in which seemingly final decisions have been reconsidered and sometimes reversed. See, e.g., Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) (notice of termination to co-worker of plaintiff later reversed); Cap v. Lehigh University, 433 F. Supp. 1275 (E.D. Pa. 1977) (denial of tenure reconsidered, but affirmed). Thus in academia as well as in the business community, decisions are often changed and it is not desirable to encourage the initiation of litigation that might thwart any internal processes of conciliation and reconsideration. At this time, when the crowded federal docket is of such great concern to the courts and to the public, courts should be loathe to create rules that unnecessarily add those cases to the docket that could be amicably resolved. Forcing an employee to hire a

lawyer or otherwise commence proceedings against his or her employer is also likely to have the negative side effect of reducing that employee's effectiveness during the balance of his or her term. Working relationships will be injured, if not sundered, and the litigation process will divert attention from the proper fulfillment of job responsibilities.

A final and compelling practical consideration supporting a broad application of the Bonham rule is that it provides a bright line guide both for the courts and for the victims of discrimination.[2]

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2. Other courts have also held that, as in Bonham, where an employee stays on the payroll beyond the time that he ceases his actual services to the employer, the 180-day period runs from the date that services ceased. See International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Greene v. Carter Carburetor Co., 532 F.2d 125 (8th Cir. 1976); Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977) (per curiam; ADEA suit).

Under the appellees' formulation, courts would have to determine when purportedly final decisions are really final and when a reasonable person would really know or have reason to know that a final decision had been made. Besides creating complexity and thereby increasing the cost of litigation, this approach is likely to become a trap for employees who, through attempts at internal resolution of their grievances, would unwittingly lose the opportunity to make a timely filing of their charge. Such an approach would ignore the learning of Love v. Pullman, 404 U.S. 522 (1972), that courts, in construing the procedural requirements of Title VII, must be mindful that it is often laymen, not lawyers, who initiate the process.

Appellees contend that, even if June 30, 1975, the date of Ricks' termi-

nation of his employment, is the appropriate date from which the 180-day period should run, Ricks' filing was untimely because it was made prior to that date. Ricks responds that a continuing violation existed from the time he was initially denied tenure to the time that his contract expired and, therefore, his filing was timely. We agree.

Although employees, who have been informed that they will be terminated, should not be compelled to file charges prior to actually leaving their jobs, neither should they be penalized for doing so. A realistic appraisal of the situation compels the conclusion that, although the termination process is punctuated by several discrete events, it is, in fact, a process. There may be points during the early part of this process when a filing of charges would be premature. By the time the charge was filed here,

however, approximately two months prior to the expiration of the contract, there was clearly no such problem.

Appellees rely on United Air Lines v. Evans, 431 U.S. 553 (1977) and Masco v. United Airlines, 574 F.2d 1127 (3d Cir. 1978), in arguing that a continuing violation theory is not applicable in this context. In both of these cases stewardesses had been actually terminated and then attempted to obtain relief for these terminations by arguing that subsequent actions by the defendant (the refusal of seniority after rehire in Evans; the refusal to rehire in Masco) were part of a continuing violation.

---

3. In Evans, four years elapsed between the respondent's initial termination and her subsequent rehire. In Masco, there was approximately a three year period between the appellants' termination and their filing of charges with the EEOC. Thus the time periods in those cases involved years subsequent to the purported illegal termination and the removal of the stewardesses from the payroll.

In this case, however, no continuity is alleged between the actual termination and some subsequent action. Instead it is only alleged that the process of termination itself was a continuing one. Thus Evans and Masco are not in conflict with our decision here.[4]

III. THE SECTION 1981 CLAIM

All parties agree that Delaware's three-year statute of limitations, 10 Del. C. §8106, is applicable to Ricks'

4. Appellees also cite Smith v. American President Lines, Ltd., 571 F.2d 102 (2d Cir. 1978), in which the court rejected the plaintiff's argument that his filing was timely as a result of events that occurred subsequent to the filing. Those subsequent events, which were never made the subject of an amended filing, were, like those in Evans and Masco, separate from the events that formed the basis of the earlier claim. Thus, Smith is not apposite to the question here of whether the expiration of the contract is properly considered a part of the termination process.

§1981 claim. The question is whether the statute runs from the College's June 1974 award of a terminal contract to Ricks or from June 1975 when that contract expired. Our analysis of when Title VII's 180-day period begins to run is also applicable to this question. We conclude, therefore, that the district court erred in dismissing this claim as barred by the statute of limitations.[5]

---

5. Appellees urge us to affirm the dismissal of the §1981 claim on the alternative basis that claims of discrimination on the basis of national origin cannot be brought under §1981. The district court noted, but did not decide, this question. We leave it to the district court on remand to make the initial determination on this contention.

IV. CONCLUSION

For the reasons stated above, we will reverse the dismissal of Ricks' claims under Title VII and §1981.[6]

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6. Appellee, Ehsan Helmy, a member of the College's Tenure Committee, argues that, even if the dismissals are reversed as to the other appellees, the dismissal of the claims against her should be affirmed because she was not named in the EEOC complaint and because her only possible participation in the alleged discrimination took place in February, 1974. Neither of these arguments provides a basis for treating Helmy different from the other appellees on this appeal. Even though she was not named in the EEOC complaint, she may be named in the district court action if the parties actually named in the EEOC complaint adequately represented her interests before the EEOC. See, Canavan v. Beneficial Finance Corp., 553 F.2d 860, 865 (3d Cir. 1977). The determination of the adequacy of this representation would require a factual record not yet complied. With respect to the argument that her participation ended in 1974, if it is proved that she took part in a continuing violation, she would be liable despite the fact that her part in this violation occurred more than 180 days before the filing of charge.

Since he has not challenged the dismissal of his other claims, those dismissals will stand.

A True Copy:

Teste :

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2565

COLUMBUS B. RICKS,

Appellant

vs.

DELAWARE STATE COLLEGE, et al.

(D. C. CIVIL NO. 77-0342)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PRESENT: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of Delaware and was submitted under Third Circuit Rule 12(6) on July 10, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 30, 1978, be, and the same is hereby affirmed in part and reversed in part and the cause is remanded for proceedings consistent with the opinion of this Court.

ATTEST:
Clerk

September 18, 1979

Certified as a true copy and issued in lieu of a formal mandate on October 10, 1979.

Test: Thomas F. Quinn

Clerk, United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
DELAWARE STATE	*	
COLLEGE, et al.,	*	Civil Action No. 77-342
	*	
Defendants.	*	

Sheldon N. Sandler, Esquire, of Bader, Dorsey & Kreshtool, Wilmington, Delaware; Judith E. Harris, Esquire, and Dona S. Kahn, Esquire, of Harris and Kahn, Philadelphia, Pennsylvania, Attorneys for Plaintiff

Nicholas H. Rodriguez, Esquire, and William D. Fletcher, Jr., Esquire, of Schmittinger and Rodriguez, Dover, Delaware, Attorneys for Defendants

Robert B. Young, Esquire of Young, and Schwartz, Dover, Delaware, Attorney for Defendant Helmy

O P I N I O N

Wilmington, Delaware

August 30, 1978

STAPLETON, District Judge:

This is an employment discrimination action, brought under the First and Fourteenth Amendments, as well as under 42 U.S.C. §§1981, 1983, 1985(3) and 2000e et seq. There are also two state law claims listed in the complaint over which the plaintiff claims that this Court has pendent jurisdiction.

Plaintiff is a black male Liberian who was employed by the Delaware State College ("the College") from 1970 to 1975. The defendants are Delaware State College, its Board of Trustees, President, Dean, the Chairman of the Education Department

there, and the faculty members of its Committee on Promotion and Tenure. The complaint alleges employment discrimination on the basis of plaintiff's national origin.

The complaint alleges that plaintiff was hired as a professor of Education and Coordinator of Science Education at Delaware State College in 1970. In 1973 and 1974, he was denied tenure. In 1974, he was awarded a terminal contract which expired on June 30, 1975.[7] In addition,

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[7]The complaint alleges that plaintiff was subsequently discharged on June 1, 1975. At oral argument, plaintiff's counsel acknowledged that his employment terminated with the expiration of his terminal contract on June 30, 1975.

plaintiff alleges that he was harrassed and abused by defendants Delaware State College, McLaughlin and Caldwell during the years 1970 to 1975. On April 4, 1975, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On July 6, 1977, he received a right to sue letter.

All of the defendants have moved for dismissal of all of the Counts of the complaint pursuant to Rule 12(b) and (c) of the Federal Rules of Civil Procedure. The counts will be discussed separately.

COUNT I

In Count I of his complaint, plaintiff claims that the actions of the defendants violated his First Amendment rights, as incorporated by the Fourteenth Amendment, by punishing him for exercising his rights of free speech and association. Defendants have moved to dismiss Count I on the ground that it is barred by the

applicable Delaware statute of limitations, 10 Del. C. §8119. In his answering brief, plaintiff has conceded that Count I is barred by that statute. Accordingly, Count I of the complaint will be dismissed.

COUNT II

In Count II of his complaint, plaintiff has alleged that the defendants discriminated against him in his employment, due to his national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., as well as under 42 U.S.C. §§1981 and 1983. Defendants have moved to dismiss the Title VII claim on the grounds of lack of jurisdiction and failure to meet the Title VII statute of limitations. Defendants have moved to dismiss the Section 1981 and Section 1983 claims on the ground that they are barred by the

applicable statute of limitations. They also contend that the Section 1981 claim fails to state a cognizable claim for relief.

1. The Title VII Claim.

Defendants initially moved to dismiss the Title VII claim on the ground that the plaintiff had not complied with 42 U.S.C. §2000e-5(c), which requires that before a charge of discrimination may be filed with the EEOC, if there is "a State or local law prohibiting the unlawful employment practice alleged and establishing . . . a local authority" to act upon the complaint, the aggrieved party must commence a proceeding under state or local law and give that proceeding a sixty day lead period. However, Plaintiff attached to his answering brief an affidavit and exhibits which indicate that he filed a charge of discrimination with the Delaware Department of Labor on April 11, 1975,

pursuant to 19 Del. C. §710, et seq., and that the Delaware Department of Labor waived jurisdiction over the charge to the EEOC. Having been confronted with the affidavit and exhibits, the defendants conceded in their reply briefs, that for purposes of this motion only, it may be assumed that plaintiff has complied with 42 U.S.C §2000e-5(c).

Defendants argue, however, that plaintiff is time barred from pursuing his Title VII claim by the 180 day provision of 42 U.S.C. §2000e-5(c). That section provides that charges of discrimination shall be filed with the EEOC[8] within 180

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[8]The charge of discrimination filed by the plaintiff with the EEOC on April 4, 1975 listed only the College and its Board of Trustees as respondents. Under 42 U.S.C. §2000e-5(f)(1), only those respondents can be defendants to a Title VII action. Plaintiff does not contest this, although he argues that the individual members of the Board of Trustees may be defendants. Due to my disposition of the statute of limitations question, I need not address that issue.

days after the occurrence of the alleged unlawful employment practice. See United Air Lines v. Evans, 431 U.S. 553 (1977).

Defendants argue that since plaintiff's tenure was denied more than 180 days before the plaintiff had filed his charge of discrimination with the EEOC, he is barred from any Title VII relief by 42 U.S.C. §2000e-5(e). Plaintiff counters, however, with the argument that (1) the last unlawful employment practice was his termination on June 30, 1975, and (2) he has alleged a continuing pattern of discrimintion, and that, therefore, his Title VII claim is not time barred.

Even if there is a continuing pattern of discrimination alleged, the crucial issue which remains is whether there is an allegation of any unlawful employment practice within the 180 day period pre-

ceding April 4, 1975,[9] the date on which the plaintiff filed his charge of discrimination with the EEOC. Unless an EEOC charge was filed within 180 days after some unlawful employment practice, there is no "present violation" for Title VII purposes. As the Supreme Court said in United Air Lines v. Evans, supra, at 558: "But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." See also Masco v. United Airlines, 574 F.2d 1127 (3rd Cir. 1978).

At oral argument, plaintiff's counsel made it clear that the only acts upon which the plaintiff relies to bring his case within the statutory period are those relating to the denial of tenure and the termination of his employment.

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[9] 180 days before April 4, 1975 is October 7, 1974.

Accordingly, the relevant inquiry is whether there are legally relevant acts connected with that denial and termination which occurred after October 7, 1974.

The complaint alleges the following facts and dates. The 1974 Committee on Promotion and Tenure denied the plaintiff tenure on February 21, 1974 and recommended the award of a terminal contract to the plaintiff. In March of 1974, plaintiff petitioned the Board of Trustees for a hearing on his denial of tenure. In April of 1974, the Board of Trustees confirmed the denial of tenure. On June 26, 1974, the Board of Trustees notified the plaintiff of his terminal contract, which would conclude on June 30, 1975. On September 12, 1974, the Board of Trustees notified the plaintiff that it would not reverse the February 21, 1974 denial of tenure. On January 15, 1975,

the President of the College reconfirmed the decision of the Board. Plaintiff was terminated from the College on June 30, 1975.

Plaintiff contends that the critical date is not when he was denied tenure and awarded a terminal contract, but rather the date upon which his services were actually terminated, June 30, 1975. Plaintiff's theory is that the Board of Trustees still has the power to reverse its decision and grant the plaintiff tenure until June 30, 1975, and that, therefore, the final unlawful employment practice did not occur until that date. I cannot agree.

I conclude that the alleged violation occurred when the Board of Trustees denied the plaintiff tenure and awarded him a terminal contract. First, the complaint alleges that the Board of Trustees is responsible for the "management, control

and conduct of the instructional, administrative and financial affairs" of the College. Therefore, it is the actions of that Board which must be looked to. Second, the allegedly discriminatory acts of the Board were the denial of tenure and the award of the terminal contract. The consequence of the Board's action, the actual termination on June 30, 1975, cannot be considered a separate action. Plaintiff's argument, that the statute of limitations was tolled while the Board was still able to reverse its position, must fail for the reasons set forth in Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977). In that case, which arose under the Fair Housing Act, the Court held that the defendant's refusal to reverse its decision not to put the plaintiff on a housing list did not "breathe life" into a claim otherwise barred by the 180 day provision of that

Act. 559 F.2d at 899. As the Court there pointed out, allowing such a refusal to change one's position to be considered to be either part of a continuing violation or an independent violation would eviscerate the statute of limitations set out by Congress.

As plaintiff's own actions illustrate, the expiration of his terminal contract on June 30, 1975 simply added nothing to his claim. Although plaintiff contends that the crucial unlawful employment practice did not occur until that date, he had filed his charge of discrimination with the EEOC on April 4, 1975. The fact is that plaintiff could have filed his charge of discrimination when the Board of Trustees denied him tenure and awarded him a terminal contract in the spring of 1974 and his case would have been no different then the one which was filed at any subsequent time.

In summary, the complaint affirmatively alleges that the Board of Trustees had decided to deny plaintiff tenure and to award him a terminal contract, and had communicated this to the plaintiff by June 26, 1974. Since the plaintiff did not file a charge of discrimination with the EEOC within 180 days after that, his Title VII claim is barred by 42 U.S.C. §2000e-5(e). The Title VII claim of Count II will be dismissed.

2. The Section 1981 and 1983 Claims.

Plaintiff maintains that even if his Title VII action is barred by the statute of limitations, that does not affect his claims under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§1981 and 1983. However, the defendants argue that these claims are also barred by the applicable statutes of limitations.

There is no statute of limitations set forth by Congress for actions brought pursuant to Section 1981 or Section 1983. It is clear, however, that in such actions, the applicable period of limitations is that which the state court would apply if the action were brought in that forum under state law. Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (Section 1981); Jennings v. Shuman, 567 F.2d 1213 (3rd Cir. 1977) (Section 1983). It is also well established in this district that civil rights actions brought under Section 1981 or 1983, based upon alleged discrimination in employment, are governed by the three year statute of limitations found in 10 Del. C. §8106. Scott v. University of Delaware, _____ F. Supp. _____ (D. Del. August 16, 1978); Guilday v. Department of Justice, 451 F. Supp. 717 (D. Del. 1978); Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287

(D. Del. 1975) (Section 1981); Trivits v. Wilmington Institute, 383 F. Supp. 457 (D. Del. 1974); Gordenstein v. University of Delaware, 381 F. Supp. 718 (D. Del. 1974) (Section 1983).

Plaintiff's complaint in this action was filed on September 9, 1977. Under the three year limitation period of 10 Del. C. §8106, any claims arising out of allegedly discriminatory acts occurring prior to September 9, 1974 are barred.

As noted above, the only date upon which the plaintiff relies to toll the statute of limitations is that relating to his denial of tenure and termination. As with the Title VII claim, the alleged violation had occurred by June 26, 1974, when the Board of Trustees notified the plaintiff of his terminal contract. That the terminal contract itself did not expire until a year later is of no legal significance in determining when the

statute of limitations begins to run, the relevant question is when the plaintiff could have sued. See, e.g., Hood v. McConemy, 53 F.R.D. 435 (D. Del. 1971). Plaintiff has pointed to no reasons why he could not have brought a lawsuit under Sections 1981 and 1983 as of June 26, 1974, based upon the same allegedly discriminatory actions now complained of. When he did not file an action within three years of that date, any such actions was barred by the provisions of 10 Del. C. §8106.

The claims of Count II brought under Sections 1981 and 1983 will also be dismissed.[10]

---

[10] This action alleges only discrimination based upon national origin. Defendants also argue that such a claim does not state a cause of action under Section 1981, which has been interpreted to protect against only racial discrimination. See, e.g., Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977); Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975).

COUNT III

In Count III of his complaint, plaintiff alleges that he was deprived by the defendants of property or liberty, without due process of law, in violation of the Fourteenth Amendment. Defendants have moved to dismiss this Count on the grounds that (1) plaintiff has failed to state a cognizable property or liberty interest protected by due process, and (2) the claim is barred by the applicable statute of limitations.

It is clear that this count also applies to the denial of tenure to the plaintiff. Plaintiff claims that the expectation of continued employment can be inferred from the current record and that, accordingly, the claim cannot be dismissed under Gordenstein v. University of Delaware, supra. I need not decide whether it can be inferred that the plaintiff had a

property or liberty interest in the expectation of continued employment, for I conclude that even if such an interest did exist, Count III is barred by the applicable statute of limitations.

As I found in Gordenstein, the applicable statute of limitations in this type of action is the three year period of 10 Del. C. §8106. Since the complaint alleges that the tenure decision had been made by April of 1974, and the complaint was not filed until September 9, 1977, Count III is barred by the three year limitation period.

COUNT IV

In Count IV of his complaint, plaintiff alleges that defendants Mishoe, Caldwell, McLaughlin, Henderson, the Board of Trustees, and the 1973 and 1974 Committees on Promotion and Tenure conspired against the plaintiff to deprive him of his civil rights, in violation of

42 U.S.C. §1985(3). Defendants have moved to dismiss this count on the grounds that (1) the plaintiff has not identified two entities capable of conspiring with one another, and (2) the claim is barred by the applicable statute of limitations.

Because I conclude that Count IV is also time barred, I need not decide whether the complaint alleges facts from which the existence of two separate and independent entities capable of conspiring with one another might be inferred. In Blake v. Town of Delaware City, 441 F. Supp. 1189, 1200 (D. Del. 1977), the Court stated, quoting Freedman v. Beneficial Corp., 406 F. Supp. 917 924 (D. Del. 1975):

> [T]he statute of limitations in a civil conspiracy runs from the time of the overt act which is alleged to have caused the damages complained of even though damages continue to flow indefinitely as a result of the act.

Although plaintiff's employment at Delaware State College was not actually terminated until June of 1975, it is clear that the overt act causing the damages was the denial of tenure. This denial was completed and the plaintiff was so notified by April of 1974. Since the complaint was not filed until September of 1977, Count IV is time barred by the three year provision of 10 Del. C. §8106. Accordingly, Count IV will be dismissed.

COUNT V

Count V is a state law claim alleging that the defendants "repeatedly wilfully and maliciously" breached their employment contracts with the plaintiff. It appears that the plaintiff is not claiming that he was terminated in the middle of a contract period, but rather that he should have been granted another contract when the last one expired, and that he failed to receive all the benefits due him under the contracts he did have.

The Delaware courts have held that the three year provision of 10 Del. C. §8106 covers actions for breach of employment contracts. Goldman v. Braunstein's, Inc., 240 A.2d 577 (Del. Sup. Ct. 1968). Goldman indicates, and this Court had held, however, that whereas an action based on a breach of contract where services have not yet been performed (i.e. wrongful termination) is controlled by Section 8106, see also Mitchell v. E. I. duPont de Nemours & Co., 310 A.2d 641 (Del. Sup. Ct. 1973), an action for damages for failure to compensate for services which have been performed is controlled by 10 Del. C. §8111, which has a one year provision. Wilmington Housing Authority v. Rocky Marciano Construction Co., 407 F. Supp. 228 (D. Del. 1976). See also Brown v. Colonial Chevrolet Co., 249 A.2d 439 (Del. Super. Ct. 1968).

Insofar as plaintiff is claiming additional compensation which he alleges he was not paid from 1970 to 1975, his claim is barred by Section 8111. Insofar as plaintiff claims that the breach of contract complained of in Count V is for improper termination, his claim is also time barred. Tenure was denied by the Board of Trustees in April of 1974, and plaintiff was notified of his terminal contract on June 26, 1974. If the contract was breached, it was breached as of those dates, and the three year provision of Section 8106 bars the action. See e.g., Hood v. McConemy, 53 F.R.D. 435 (D. Del. 1971). That the defendants could subsequently have changed their minds does not alter the date of the alleged breach.

Accordingly, Count V will be dismissed.

COUNT VI

Count VI is a claim for emotional and mental distress. Defendants have moved to dismiss this count on the grounds that it is time barred by 10 Del. C. §8119. Plaintiff has conceded in his brief that Count VI should be dismissed. Therefore, Count VI will be dismissed.

SUMMARY

The parties have agreed that Counts I and VI must be dismissed under the applicable statutes of limitations. I have concluded that Counts II, III, IV and V are also time barred. Accordingly, all counts of the plaintiff's complaint will be dismissed.[11]

---

[11] Defendant Helmy has filed a counterclaim against the plaintiff for malicious prosecution and abuse of process. This is a claim arising under State law. Given the disposition of the federal claims, the Court will not exercise its pendent jurisdiction over the counterclaim. The counterclaim will, therefore, be dismissed without prejudice.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	C.A. No. 77-342
	*	
DELAWARE STATE COLLEGE, et al.,	*	
	*	
Defendants.	*	

ORDER

THIS 30th day of August, 1978, for the reasons stated in the Court's Opinion of this date,

NOW, THEREFORE, IT IS ORDERED that:

1. Defendants' motion to dismiss all counts of the complaint is granted.

2. Defendant Helmy's counterclaim is dismissed without prejudice.

/s/ Walter K. Stapleton
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 77-342
	*	
DELAWARE STATE COLLEGE, et al.,	*	
	*	
Defendants.	*	

Sheldon N. Sandler, Esquire, of Bader, Dorsey & Kreshtool, Wilmington, Delaware; Judity E. Harris, Esquire, and Dona S. Kahn, Esquire, of Harris and Kahn, Philadelphia, Pennsylvania, Attorneys for Plaintiff

Nicholas H. Rodriguez, Esquire, and William D. Fletcher, Jr., Esquire, of Schmittinger and Rodriguez, Dover, Delaware, Attorneys for Defendants

Robert B. Young, Esquire, of Young and Schwartz, Dover, Delaware, Attorney for Defendant Helmy

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MEMORANDUM OPINION

Wilmington, Delaware

October 16, 1978

STAPLETON, District Judge:

On August 30, 1978, this Court issued an Opinion and Order dismissing all counts of the plaintiff's employment discrimination action on limitations grounds. Plaintiff has now moved for reconsideration of the Court's decision, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In support of his motion, plaintiff has cited Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1978), a recent Third Circuit case not previously brought to the Court's attention. For the reasons which follow, I do not believe that Bonham is controlling in this case, and will, therefore, deny the plaintiff's motion for reconsideration.

I concluded in my Opinion of August 30, 1978, that plaintiff was barred

by the 180 day provision of 42 U.S.C. §2000e-5(e), because there was no allegation of any unlawful employment practice within 180 days before April 4, 1975, the date upon which the plaintiff filed his charge of discrimination with the EEOC. United Air Lines v. Evans, 431 U.S. 553 (1977). In particular, I found that plaintiff's claims regarding the decisions to deny his tenure and to grant him a one year terminal contract accrued in the spring of 1974 when the Board of Trustees of the college affirmed those decisions and plaintiff was so advised. Plaintiff argues, however, that since his terminal contract did not actually expire until June 30, 1975, under Bonham, the 180 day period did not begin to run until that date.

The Bonham decision involves the requirements of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621,

et seq., that an aggrieved party must give 60 days notice to the Secretary of Labor before commencing an action against his or her employer in court and that such notice must come within 180 days "after the alleged unlawful practice occurred." 29 U.S.C. §626(d)(1). Bonham was a non-contract employee who claimed that his employment was terminated as a result of age discrimination. The Court of Appeals agreed with the District Court holding that the alleged violation occurred, for purposes of applying the 180 day rule, when Bonham was relieved of his job responsibilities and was told that his employment was terminated, despite the fact that his salary and benefits continued for a period of two months thereafter. The Court of Appeals nevertheless reversed the entry of summary judgment for the defendant, finding material disputes of fact as to

whether there were circumstances which called for a tolling of the running of the statutory period, i.e., the employer's breach of his statutory duty to post notice of the existence of the ADEA, 29 U.S.C. §627, and the employer's encouragement of Bonham to believe that he might be placed elsewhere in the company.

This case, however, involves nothing analogous to the circumstances which the Court thought might toll the statutory period in Bonham. Plaintiff's argument initially and again on the motion to reargue is not that he was encouraged to think that the decision to deny him tenure would be revoked or even that there were appeal procedures which remained unexhausted within 180 days of the filing of his charge. Rather, his argument is that the 180 day period did not begin to run until his job responsibilities ceased upon the expiration of his terminal contract in June of 1975.

I conclude plaintiff reads Bonham more broadly than is justified and that his argument is untenable. Bonham does not hold that a termination of employment, for purposes of applying the 180 day period, can never occur without the employee physically leaving the employer's premises, and, even if it did, it would be of doubtful relevance in a case where the alleged violation is a failure to offer a faculty contract without term. The simple fact of the matter is that plaintiff's claim ripened long before June 30, 1975, and that the option of filing a charge was open to him for many months before that date. Indeed, it is somewhat anomalous for him to suggest otherwise since he in fact filed his claim with the EEOC on April 4, 1975.

Thus, I remain of the view that the 180 day period began to run in the spring of 1974 when the Board of Trustees af-

firmed the decisions to deny tenure and to grant a terminal contract.[12] Accordingly, the motion for reconsideration will be denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No.77-342
	*	
DELAWARE STATE COLLEGE, et al.,	*	
	*	
	*	
Defendants.	*	

O R D E R

---

[12] I remain of the same view with respect to the commencement of the runing of the statutory period on plaintiff's other claims.

THIS 16th day of October, 1978, for the reasons stated in the Court's Memorandum Opinion of this date,

Now, therefore, IT IS ORDERED that plaintiff's motion for reconsideration of the Court's decision of August 30, 1978 is denied.

/s/ Walter K. Stapleton
United States District Judge

Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED
DECEMBER 17, 1979

CERTIORARI GRANTED
FEBRUARY 19, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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THE FOLLOWING OPINIONS, DECISIONS, JUDGMENTS, AND ORDERS HAVE BEEN OMITTED IN PRINTING THIS APPENDIX BECAUSE THEY APPEAR ON THE FOLLOWING PAGES IN THE APPENDIX TO THE PRINTED PETITION FOR CERTIORARI

	PAGE
OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF DELAWARE, DATED AUGUST 30, 1978	20a

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ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE DISTRICT COURT FOR THE DISTRICT OF DELAWARE, DATED OCTOBER 16, 1978 51a

OPINION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED SEPTEMBER 18, 1979 1a

JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT, ENTERED ON SEPTEMBER 18, 1979 18a

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 9, 1977-Plaintiff Ricks' Complaint filed in the United States District Court for the District of Delaware.

Oct. 31, 1977-Answer and Motions to Dismiss filed by all Defendants, except Ehsan Helmy, asserting inter alia application of the pertinent statutes of limitations.

Nov. 7, 1977-Answer and Motion to Dismiss of Defendant Ehsan Helmy filed, asserting inter alia the same grounds asserted by the other Defendants.

Dec. 13, 1977-Motion of Defendants, except Helmy, for judgment on pleadings filed.

Aug. 30, 1978-Opinion and Order of the District Court entered granting Defendants' Motions to Dismiss all counts of the Complaint.

Sept. 11, 1978-Plaintiff Ricks' Motion for Reconsideration by District Court of its Order of Dismissal of Complaint filed.

Oct. 16, 1978-Memorandum Opinion and Order of the District Court denying Plaintiff Ricks' motion for reconsideration entered.

Oct. 24, 1978-Plaintiff Ricks' Notice of Appeal filed.

Sept. 18, 1979-Opinion and Judgment of the Court of Appeals for the Third Circuit entered.

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF DELAWARE

COLUMBUS B. RICKS, Civil Action No. 77-342

Plaintiff,

v.

DLEAWARE STATE COLLEGE, WALTON H. SIMPSON, WILLIAM H. DAVIS, WILLIAM G. DIX, EDWARD W. HAGEMEYER, JAMES C.

HARDCASTLE, DELMA
LAFFERTY, JAMES H.
WILLIAMS, WILLIAM S.
YOUNG, BURT C. PRATT,
LUNA I. MISHOE, PIERRE S.
DuPONT, IV, M. MILFORD
CALDWELL, GEORGE W.
McLAUGHLIN, ROMEO C.
HENDERSON, HARRIET R.
WILLIAMS, ARTHUR E.
BRAGG, ORA BUNCH, EHSAN
HELMY, VERA POWELL, JOHN R.
PRICE, HERBERT THOMPSON,
W. RICHARD WYNDER, ULYSSES
WASHINGTON, JANE LASKARIS,
individually, and in their
official capacities,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. Plaintiff files this complaint instituting these proceedings and invoking the jurisdiction of this court under 28 U.S.C. §1331 and 28 U.S.C. §1343(3) and (4) to obtain declaratory and injunctive relief, back pay, compensatory damages, punitive damages, and the costs of suit, including reasonable attorneys' fees for injuries caused by defendants' violation

of rights as guaranteed in the First and Fourteenth Amendments to the Constitution of the United States and by federal law, particularly certain Civil Rights Acts found at 42 U.S.C. §1981, §1983, §1985(3) and 42 U.S.C. §2000e(5) et. seq., (hereinafter "Title VII"). Relief is sought pursuant to the aforementioned statutes and to 42 U.S.C. §1988 (as amended P.L. 94-599, October 19, 1976) and 28 U.S.C. §2201 (The Declaratory Judgment Act). The matter in controversy exceeds $10,000, exclusive of interest and costs.

2. This court is also requested to assume pendent jurisdiction over a breach of contract and intentional infliction of mental distress claims arising out of the facts forming the basis of the federal claims over which this court has jurisdiction.

3. The violations of plaintiff's rights as alleged herein were committed within the State of Delaware.

PARTIES

4. Plaintiff, Columbus B. Ricks, a black male of liberian national origin, was employed by Delaware State College, Dover, Delaware from September 1, 1970 to June 1, 1975.

5. Defendant Delaware State College (hereinafter "Del. State") is an educational institution organized as a corporation under the laws of Delaware and is located in the City of Dover. For each of the years since March 24, 1972 it has had at least fifteen (15) employees for each twenty (20) weeks of each calendar quarter and is an employer within the meaning of Title VII.

6. Defendants Walton H. Simpson, William H. Davis, William G. Dix, Edward W. Hagemeyer, James C. Hardcastle, Delma Lafferty, James H. Williams, William S. Young, Burt C. Pratt and Luna I. Mishoe are, and at all times

material hereto, were Trustees of Delaware State College. Defendant Pierre S. duPont, IV is named in his capacity as an ex oficio member of the Board of Trustees (hereinafter "Board of Trustees"). Defendant Trustees, with the exception of Pierre S. DuPont, IV, are sued individually and in their own capacities as Trustees of Del. State College.

7. Defendant Board of Trustees consists of eleven (11) members, six (6) of whom are appointed by the Governor of Delaware and five (5) of whom are elected by the Board of Trustees itself.

8. Defendant Board of Trustees is vested by statute with responsibility for the management, control and conduct of the instructional, administrative and financial affairs of Del. State. As additional Board of Trustees become known to plaintiff, plaintiff reserves the right to add them to the complaint.

9. Defendant Luna I. Mishoe (hereinafter "Mishoe") is and has been, at all times material hereto, the President of Del. State and is responsible for overseeing the instructional, administrative and financial affairs of Del. State. Defendant Mishoe maintains offices at Del. State and is sued individually and in his capacity as President of Del. State as well as in his capacity as an ex oficio member of the Board of Trustees.

10. Defendant M. Milford Caldwell (hereinafter "Caldwell") is and was, at all times material hereto, the Academic Dean of Del. State. He maintains offices at Del. State. For the years 1970 through 1975 defendant Caldwell was responsible for the academic affairs of the college and reported to defendant Mishoe. Defendant Caldwell is sued as an individual and in his former capacity as Academic Dean.

11. Defendant George Washington McLaughlin (hereinafter "McLaughlin") was, from September, 1972 until January, 1975, Chairman of the Department of Education of Del. State. He was responsible for the administration of his department and reported to defendant Caldwell. Throughout that time he resided in the State of Delaware and maintained offices at Del. State. Defendant McLaughlin is sued as an individual and in his former capacity as Chairman of the Department of Education.

12. Defendants Harriet R. Williams, Herbert Thompson, Ulysses S. Washington, Jane Laskaris and W. Richard Wynder are members of the faculty of Del. State. They were members of the Committee on Promotions and Tenure for the academic year 1973. (hereinafter "1973 Committee").

13. Defendants Harriet R. Williams, Romeo C. Henderson, Arthur E. Bragg, Ora

Bunch, Ehsan Helmy, Vera Powell and John R. Price were members of the Committee on Promotion and Tenure for the academic year 1974. (hereinafter "1974 Committee")

14. The members of the 1973 and 1974 Committees are sued individually and in their capacites as members of those committees. As additional names of committee members become known to plaintiff, plaintiff reserves the right to add them to the complaint.

15. Defendant Romeo C. Henderson (hereinafter "Henderson") was, in the academic years 1970, 1971 and 9172 Acting Chairman of the Department of Education and maintained offices at Del. State. In his capacity as Acting Chairman he was responsible for the administration of the Department of Education and reported to defendant Caldwell. Defendant Henderson

is sued in his individual and in his former capacity as Chairman of the Department of Education.

16. All parties hereto with the exception of plaintiff and defendant Helmy are americans.

17. Defendants have been and continue to act under color of state law in that Del. State is a corporation whose activities are so connected with those of the State of Delaware as to constitute state action for purposes of 42 U.S.C. §1983. Other named defendants are present or former employees of Del. State.

FACTS

18. On or about September 1, 1970 plaintiff was hired by defendant Del. State through defendants Caldwell and Mishoe as a Professor of Education in the Department of Education and Coordinator of Science Education.

19. On or about September 1, 1970 plaintiff was appointed by defendant Del. State to the additional position as Director of the UPSTEP program at Del. State, a federally funded program for the instruction of teachers of Science Education in the State of Delaware. Additional compensation was to be paid by defendant Del. State to plaintiff for performing the duties of this position. Said compensation was not paid in any of the years 1970 through 1975.

20. On or about December, 1970, plaintiff was appointed to the additional position of Component Coordinator of the Del-Mod program at Del. State. Additional compensation was to be paid by defendant Del. State to plaintiff for performing the duties of this position. Said compensation was not paid in any of the years 1970 through 1975.

21. Under the terms of plaintiff's appointment to the faculty of Del. State he was to be considered for tenure after his second year of instruction at Del. State.

22. On January 11, 1971 and November 15, 1971 plaintiff was evaluated by defendant Henderson and found to be performing in such a manner as to receive positive evaluations. Said evaluations were concurred in by defendant Caldwell.

23. On or about February, 1972, defendant Henderson informed plaintiff that though he wanted to recommend plaintiff for tenure, because of defendant Caldwell's instructions to defendant Henderson to recommend against granting plaintiff tenure and contract renewal and to dismiss plaintiff, defendant Henderson compromised and recommended that plaintiff be retained and reconsidered for tenure in 1973.

24. Defendant Del. State failed to consider plaintiff for tenure in 1972 in accordance with its contract of employment with plaintiff.

25. On or about March 1, 1973 plaintiff was evaluated by the department Chairman, defendant George Washington McLaughlin and recommended for tenure.

26. Though defendant Caldwell concurred in the March 1, 1973 recommendation of plaintiff for tenure, defendant Caldwell thereafter, on or about March 21, 1973, in violation of established college procedures, met with the defendant McLaughlin and defendant 1973 Committee and coerced defendants McLaughlin and the 1973 Committee to deny plaintiff tenure. Said coercion was concealed from plaintiff.

27. Though defendant McLaughlin recommended plaintiff to the 1973 committee, that committee denied plaintiff

tenure on March 21, 1973, but recommended that he be reconsidered for tenure in 1974, and if denied tenure then he be given a terminal contract.

28. Plaintiff was not provided in advance with the reasons for denial of tenure, nor given the opportunity to present a response to those reasons. Said reasons were concealed from plaintiff.

29. Throughout the years 1970 to 1975 defendants McLaughlin, Caldwell and Del. State, through its agents McLaughlin or Caldwell, engaged in an ongoing pattern of harrassment and abuse of the plaintiff in the following manner, including but not limited to the following:

a. Falsely and maliciously accusing him of being a poor teacher.

b. visiting plaintiff's classes and informing his students therein assembled that no matter what grades plaintiff awarded them, none would fail.

c. pressuring plaintiff to change grades of students in his classes.

d. interfering with plaintiff's performance of his duties as Coordinator of Science Education and Director of UPSTEP.

e. continuing to refuse to allow plaintiff to teach summer school and night school.

f. threatening plaintiff with bodily harm.

g. urging plaintiff to resign because they did not want him to teach at Del. State.

h. interfering with his method of instruction of the students in his classes.

i. employing an american in the Department of Education in July, 1973, with fewer qualifications and less experience for the job of Component Coordinator, and assigning him to teach

courses in summer school that plaintiff was more qualified to teach, had originally been hired to teach and had made preparation to teach.

j. on or about October, 1974 removing plaintiff from teaching responsibility for courses which he had been assigned to teach and replacing him with a less qualified american.

k. paying the same wage from and after September, 1973 to an american with fewer qualifications and less experience and less professorial rank than plaintiff, while denying plaintiff wages commensurate with his experience and duties and with those of other full professors and which plaintiff was, owed under his contracts.

l. denying plaintiff books and other instructional materials necessary for the conduct of his classes and performance of his other duties.

30. Though plaintiff performed his duties in 1973 and 1974 as he had in the academic years 1970, 1971 and 1972 when he received favorable evaluations and/or recommendations for tenure, defendants McLaughlin and Caldwell recommended to the defendant 1974 Committee that tenure be denied.

31. On February 21, 1974 the defendant 1974 Committee requested defendant McLaughlin to appear before it to explain his recommendation against tenure.

32. Though defendant McLaughlin appeared and presented his position, said position was based on information which was known by him to be false or which was without documentation, plaintiff was not afforded an opportunity to know the reasons set forth by defendant McLaughlin, nor was he provided an opportunity to present his position with respect to those

charges prior to the 1974 Committee's decision denying tenure. Said reasons were concealed from plaintiff.

33. The 1974 Committee denied plaintiff tenure on February 21, 1974 and recommended the award of a terminal contract to plaintiff.

34. On or about March 30, 1974 plaintiff petitioned defendant Mishoe to reconsider the denial of tenure. Though defendant Mishoe knew of defendant 1974 Committee's failure to provide plaintiff with notice of the reasons that his tenure was opposed by defendants McLaughlin and Caldwell and an opportunity for plaintiff to present his position with respect to those reasons, as well as the conduct of defendants Caldwell and McLaughlin during the course of plaintiff's employment at Del. State, he failed to respond to plaintiff's request for hearing and relief, and in fact advised plaintiff that

a hearing was unnecessary because he had decided to affirm the denial of tenure.

35. On or about March, 1974 plaintiff petitioned the defendant Board of Trustees for a hearing on plaintiff's denial of tenure.

36. On or about April, 1974 the Board confirmed the denial of tenure to plaintiff.

37. On or about June 26, 1974 the defendant Board of Trustees notified plaintiff of his terminal contract to conclude on June 30, 1975.

38. On or about May, 1974 a post-denial of tenure hearing was held by the Educational Policy Committee of defendant Board.

39. By letter dated September 12, 1974 the Board notified plaintiff that it would not reverse the February 21, 1974 denial of tenure. Said action by the defendant Board of Trustees was allegedly

based on a review of plaintiff's evaluations for the academic years 1971, 1972, 1973 and 1974.

40. On or about December 11, 1974 during the course of a meeting in his office defendant McLaughlin physically attacked plaintiff.

41. On or about January 30, 1975 defendant McLaughlin was convicted of assault on plaintiff in a criminal proceeding. Said conviction was based on the conduct of defendant McLaughlin that occurred on December 11, 1974.

42. On or about January 15, 1975 defendant Mishoe reconfirmed the decision of the defendant Board of Trustees of September 12, 1974.

43. On or about February 5, 1975 defendant Caldwell permitted defendant McLaughlin, who had assaulted plaintiff to evaluate plaintiff's performance. Defendant Caldwell concurred in said

evaluation. Said evaluation of February 5, 1975 was wilfully and maliciously given and false in its material respects.

44. Notwithstanding a favorable evaluation on or about January 30, 1975 of plaintiff by the Acting Chairman of the Department of Education who replaced defendant McLaughlin on December 12, 1974, defendant Mishoe failed or refused to inquire into the conduct of defendant McLaughlin, whom he had removed from the position of Department Chairman, into the conduct of defendant Caldwell which plaintiff had callenged as violative of his rights. Mishoe reconfirmed the September 12, 1974 decision of the defendant Board of Trustees.

45. Though defendant Mishoe was present at that hearing on January 30, 1976, he took no action to reinvestigate the plaintiff's earlier complaints to him of the conduct of defendant McLaughline

with respect to plaintiff's 1974 tenure denial, and further defendant Mishoe thereafter relied on that evaluation of plaintiff by defendant McLaughlin in not reconsidering plaintiff's subsequent requests from and after January 30, 1975 for tenure.

46. On or about April 7, 1974, plaintiff filed a charge of discrimination based on national origin with the Equal Employment Opportunity Commission (a copy of said charge is attached hereto as exhibit "A").

47. On or about July 6, 1977, the United States Department of Justice issued a notice of right to sue to plaintiff. (A copy of said notice is attached hereto as exhibit "B").

48. Plaintiff was discharged effective June 1, 1975.

CLAIMS FOR RELIEF

Paragraphs one through forty-eight of this complaint are incorporated herein and made part of Counts I through VI as fully stated herein.

COUNT I

The actions of the defendants violated plaintiff's First Amendment rights in that their actions were intended to and did in fact punish plaintiff for his exercise of freedom of speech, association, inquiry and his academic freedom.

COUNT II

The actions of the defendants denied plaintiff his right to be free from employment discrimination in violation of 42 U.S.C. §1981, §1983 and §2000e(5) in that defendants treated plaintiff differently from other faculty members because of his national origin.

COUNT III

The actions of defendants denied plaintiff his right not to be deprived of property or liberty without due process of law in that defendants actions were:

a. arbitrary and capricious and based on unlawful and irrevelant criteria.

b. made without affording him notice of charges and an opportunity to a hearing prior to his initial denials of tenure.

c. based on criteria which were unlawful and which differed from that uniformly applied to other faculty employed by Del. State.

COUNT IV

The defendants Mishoe, Caldwell, McLaughlin, Henderson, Board of Trustees, 1973 and 1974 Committees conspired against plaintiff to deprive him of his civil rights in violation of 42 U.S.C. §1985(3).

COUNT V

The actions of defendants repeatedly wilfully and maliciously breached its employment contracts with plaintiff.

COUNT VI

The actions of the defendants intentionally inflicted emotional and mental distress on plaintiff.

PRAYER FOR RELIEF

Plaintiff requests that this court:

1. Grant a jury trial on all issues in this case.

2. Declare that defendants have violated plaintiff's constitutional and statutory rights.

3. Reinstate plaintiff to his position as Professor of Education and Coordinator of Science Education.

4. Grant plaintiff tenure and all rights attendant thereto effective September 30, 1972.

5. Expunge from records maintained by defendants any and all adverse comments or references to plaintiff as to facts forming the basis of the allegations set forth above.

6. Enjoin defendants from referring to the incidents in this complaint or considering them when providing plaintiff with a reference for any future employment.

7. Award plaintiff back pay, including retirement, and other benefits to which he is entitled.

8. Award plaintiff compensatory damages resulting from defendants' violation of plaintiff's rights.

9. Award plaintiff punitive damages for defendants' wilful and malicious conduct in the amount of three million dollars.

10. Award plaintiff attorneys' fees and costs in this action.

11. Award plaintiff such other relief as this court deems necessary.

RESPECTFULLY SUBMITTED,

/s/ Judith E. Harris
JUDITH E. HARRIS
DONA S. KAHN
Attorneys for plaintiff

SHELDON SANDLER
BADER, DORSEY & KRESHTOOL
P.O. Box 2202
1102 West Street
Wilmington, DE 19801

Of Counsel:

HARRIS AND KAHN
1521 Three Girard Plaza
Philadelphia, PA 19102

TELE: (215) 568-4202

EXHIBIT "A" TO THE COMPLAINT

See Appendix of Appellant in the United States Court of Appeals for the Third Circuit portion of record at A-18.

EXHIBIT "B" TO THE COMPLAINT

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D.C. 20530

Address Reply to the
Division indicated
and Refer to Initials and Number
SDS:SJF:mal
DJ 169-15-8

CERTIFIED MAIL

Mr. Columbus B. Ricks
337 McArthur Drive
Dover, Delaware 19901

RE: EEOC Charge Against Delaware State College
No. 003-51844-6

Dear Mr. Ricks:

The Civil Rights Division has completely reviewed the file referred to us by the Equal Employment Opportunity Commission (EEOC) in its investigation of your charge of discrimination, and we have determined that we will not file suit in this particular matter against the respondent. This should not be taken to mean that the United States has made a judgment as to whether or not your charge is meritorious.

You are hereby notified that conciliation on your case was unsuccessful by the EEOC. You are further notified that you have the right to institute a civil action under Title VII of the Civil Rights

Act of 1964, as amended, 42 U.S.C. §200e, et. seq., against the above-named respondent. If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

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Therefore, you should consult an attorney of your own choosing at your earliest convenience. If you are unable to locate an attorney, you may wish to contact the EEOC, or apply to the Federal District Court in your area, since that court may appoint an attorney in appropriate circumstances.

We are returning the files in this matter to the EEOC's District Office. If you or your attorney have any questions concerning this matter or wish to inspect the investigative file, please feel free to contact the EEOC office handling your charge, whose address is listed below.

Sincerely,

DREW S. DAYS, III
Assistant Attorney General
Civil Rights Division

BY: /s/ Samuel J. Flanagan
Samuel J. Flanagan
Attorney
Education Section

cc: Mr. Walter Dickerson
Director, EEOC
Baltimore District Office
Rotunda Bldg. - Rm. 210
711 W. 40th Street
Baltimore, MD 21211

ANSWER OF DEFENDANTS EXCEPT
DEFENDANT EHSAN HELMY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	C.A. No. 77-342
	*	
Plaintiff,	*	
	*	
v.	*	
	*	ANSWER
DELAWARE STATE	*	
COLLEGE, et al.,	*	
	*	
Defendants.	*	

COMES NOW the Defendants, above mentioned excepting the Defendant Ehsan Helmy, by and through their attorneys, Schmittinger and Rodriguez, P.A. and answer Plaintiff's Complaint as follows:

1. Denied that any of Plaintiff's constitutional rights were violated or that any federal laws were violated and

further denied that Plaintiff is entitled to any relief or remedy alleged in this paragraph. Admitted that the jurisdictional statutes cited by Plaintiff have applicability to the causes of action alleged in this Complaint, excluding any claim under 42 USC §2000e. Defendants are without sufficient information or knowledge to form a belief as to the truth of Plaintiff's averment concerning the matter in controversy exceeding $10,000 exclusive of interest and costs. Remaining allegations of this paragraph are admitted.

2. Denied that Defendants violated any of Plaintiff's rights. The remainder of this paragraph is admitted.

4. Admitted that Plaintiff was employed by Delaware State College of Dover, Delaware for five consecutive academic years commencing with the academic year of September 1, 1970 to June 30, 1971 and concluding with the

fifth academic year September 1, 1974 to June 30, 1975. All other allegations of this paragraph are denied.

5. Admitted that Delaware State College is an educational institution organized as a corporation under the laws of the State of Delaware and is located in the City of Dover. Further admitted that for each of the years since March 24, 1972, Delaware State College has had at least fifteen employees for each twenty weeks of each calendar quarter. Defendants are without sufficient information or knowledge to form a belief as to the truth of the remaining averments of this paragraph.

6. Denied that Defendant Pierre S. DuPont, IV, as an ex officio member of the Board of Trustees of Delaware State College was such at any and all times material to this Complaint. It is further denied that Luna I. Mishoe was a regular

member of the Board of Trustees of Delaware State College. Rather, Defendant Mishoe was an ex officio member of this Board. The remaining averments of this paragraph are admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Defendant McLaughlin held the position of Chairman of the Department of Education from September 1972 until December 18, 1874 only. The remaining averments of this paragraph are admitted.

12. Denied that Jane Laskaris was a member of the Committee on Promotions and Tenure for the academic year 1972-1973. The remainder of this allegation is admitted, however, Herbert Thompson did not participate in any decicions concerning promotions and tenure for this academic year due to his failure to attend such a meeting.

13. Denied that Harriet R. Williams was a member of the Committee on Promotion and Tenure for the academic year 1973-1974. Admitted that the remaining persons were members of this committee, however, Romeo C. Henderson was absent from any meeting that considered promotion and/or tenure of any and all faculty members for the academic year 1973-1974.

14. Admitted.

15. Denied that Romeo C. Henderson was acting chairman of the Department of Education of Delaware State College in the academic year 1972-1973. Assuming that the Plaintiff is referring to the academic years 1970-1971 and 1971-1972, the remaining averments of this paragraph are admitted.

16. Defendants are without sufficient information or knowledge to form a belief as to the truth of this averment.

17. Denied.

18. Admitted that Plaintiff was hired by Delaware State College on or about September 1, 1970 by entering a contract of employment with this Defendant and executed by Defendant Mishoe on behalf of Delaware State College. Defendant Caldwell made the initial recommendation that this hiring be made.

19. Admitted that Plaintiff had the additional responsibility of being the Director of the Up-Step Program. However, this responsibility was part of the duties accepted by him by his contract for the 1970-1972 school year. The remaining averments of this paragraph are denied.

20. Admitted that Plaintiff was appointed as a Component Coordinator of the Del-Mod Program. However, this responsibility was part of the duties accepted by him in his contract for the academic years 1970-1971 and 1971-1972.

Plaintiff was terminated from this position at the end of the 1971-1972 school year. The remaining averments of this paragraph are denied.

21. Admitted, noting that according to the regulations of Delaware State College, such consideration for tenure is made during the following school year which was done in Plaintiff's case.

22. Admitted that Plaintiff was evaluated during the 1970-1971 school year on or about January 11, 1971 which Defendant Caldwell concurred in. Admitted that Plaintiff was evaluated during the 1971-1972 school year on or about November 15, 1971 however, it is denied that Defendant Caldwell concurred in this evaluation. Defendants are without sufficient information or knowledge to form a belief as to the truth of the remainder of the averments of this paragraph.

23. Denied.

24. Denied, Defendant Delaware State College considered Plaintiff for tenure during the 1972-1973 school year in accordance with its regulations and practices and in a timely and proper fashion.

25. Admitted.

26. Admitted that Defendant Caldwell concurred in the evaluation of March 1, 1973. The remaining averments of this paragraph are denied.

27. Denied that the 1972-1973 Promotions and tenure Committee denied Plaintiff tenure. The remaining averments of ths paragraph are admitted.

28. Denied.

29. Denied.

a. Denied.

b. Denied.

c. Denied.

d. Denied.

e. Denied.

f. Denied.

g. Denied.

h. Denied.

i. Denied.

j. Admitted that such removal occurred, however, the removal from a class listed as Education 304 was agreed to by Plaintiff.

k. Denied.

i. Denied.

30. Admitted that Defendants McLaughlin and Caldwell recommended through Plaintiff's evaluation of 1973-1974 that the 1973-1974 Committee on Promotions and Tenure recommend that Plaintiff be denied tenure. The remaining averments of this paragraph are denied.

31. Denied that the 1973-1974 Promotions and Tenure Committee initiated this appearance. The remaining averments of this paragraph are admitted.

32. Admitted that Defendant McLaughlin appeared before the 1973-1974 Promotions and Tenure Committee. The remaining averments of this paragraph are denied.

33. Admitted that the 1973-1974 Promotion and Tenure Committee recommended that Plaintiff be denied tenure. The remaining averments of this paragraph are denied.

34. Denied. This matter had been acted upon by the Board of Trustees of Delaware State College prior to any meeting between Plaintiff and Defendant Mishoe on or about March 30, 1974, and accordingly was beyond Defendant Mishoe's control. However, there were specific grievance procedures in existence for Plaintiff to pursue with the Board of Trustees which Defendant Mishoe informed Plaintiff of at this meeting.

35. Denied. No request was made for a hearing before the Board of Trustees prior to April 23, 1974 (See Exhibit "A" attached to ths answer).

36. Denied.

37. Admitted, but this notification clearly stated that this terminal contract would be superseded by any future decision to grant Plaintiff tenure pending the outcome of his grievance procedure hearing (see Defendant's Exhibit "B" attached).

38. Admitted that on or about May 20, 1974, the Board of Trustees through its Educational Policy Committee conducted a grievance hearing concerning Plaintiff pursuant to its grievance procedures and Plaintiff's request of April 23, 1974.

39. Admitted that the Board of Trustees notified Plaintiff of its decision concerning Plaintiff's tenure

status by letter of September 12, 1974. The remainder of the averments found in this paragraph are denied.

40. Admitted that an altercation between these two parties occurred on December 11, 1974, however the same was instigated by the Plaintiff.

41. Admitted.

42. Denied.

43. Denied.

44. Denied.

45. Admitted that Defendant Mishoe was present at a hearing held on or about January 30, 1975 in Justice of the Peace Court No. 7. The remainder of the averments of this paragraph are denied.

46. Defendants are without sufficient information or knowledge to form a belief as to the truth of this averment.

47. Defendants are without sufficient information or knowledge to form a belief as to the truth of this averment.

48. Admitted that Plaintiff's employment relationship with the Defendant, Delaware State College concluded on June 30, 1975.

AFFIRMATIVE DEFENSE I.

49. Any and all sufficiently alleged causes of action constituting a violation of Plaintiff's constitutional, federal, state or common law rights are barred by the statute of limitations.

50. Any and all sufficiently alleged causes of action constituting a violation of Plaintiff's constitutional, federal, state or common law rights are barred by the Doctrine of Laches.

AFFIRMATIVE DEFENSE III.

51. Plaintiff is estopped from asserting any causes of action against

these parties on the basis of a "full-blown" evidentiary grievance hearing provided Plaintiff from May 1974 through July 1974 by the Educational Policy Committee which resulted in the Board of Trustee's decision of September 12, 1974 from which Plaintiff has failed to challenge in any manner or seek any timely judicial review of the same.

AFFIRMATIVE DEFENSE IV.

52. Plaintiff is estopped from asserting any causes of action against these parties relating to the procedures of the Promotions and Tenure Committees due to his unreasonable failure to question their actions before the Faculty Senate of Delaware State College even though Plaitiff was totally and fully aware of such procedures and the actions of these Committees.

AFFIRMATIVE DEFENSE V.

53. Concerning Defendant, McLaughlin, any and all allegations of Plaintiff are barred on the basis of Res Judicata.

AFFIRMATIVE DEFENSE VI.

54. Plaintiff is barred from recovering any monetary judgment against any of the individual defendants on the basis of their official immunity as public officials and a lack of bad faith on their part relating to any matter raised in the complaint.

MOTIONS TO DISMISS PURSUANT TO RULE 12(b)

55. Defendants move pursuant to Rule 12(b)(6) that all of Plaintiff's counts be dismissed on the basis that the Plaintiff has failed to state a cause of action from which he is entitled to relief on the facts pleaded by him due to the statute of limitations.

56. Defendants move pursuant to Rule 12(b)(6) that Count III be dismissed on the basis that the Plaintiff has failed to state a cause of action upon which relief can be granted due to his failure to plead any cognizable property or liberty interest.

57. Defendants move pursuant to Rule 12(b)(6) that Count II and III under 42 USC §1983 be dismissed against Defendant Delaware State College since this defendant is not a person.

58. Defendants move pursuant to Rule 12(b)(6) that Plaintiff's Count II based upon 42 U.S.C. §1981 be dismissed on the basis that Plaintiff has failed to state a cause of action upon which relief can be granted due to the fact that this statute does not apply to discrimination on the basis of national origin.

59. Defendants move pursuant to Rule 12(b)(6) that Plaintiffs Count IV based

upon 42 USC §1985(3) be dismissed on the basis that Plaintiff has failed to state a cause of action upon which relief can be granted since only one corporate entity and its employees could possibly be included in that allegation.

60. Defendant George Washington McLaughlin, moves, pursuant to Rule 12(b)(2) and 12(b)(5), for dismissal of this action against this Defendant for lack of personal jurisdiction over this Defendant, who was neither residing, domiciled or located in Delaware when served with process in this matter, and due to a failure on the part of Plaintiff to comply with Rule 4(f) in serving this Defendant at his place of abode at Route 1, Box 167, Trevillianas, Virginia.

WHEREFORE, the Defendants pray that this Court will dismiss Plaintiff's action

against the Defendants and assess costs of this action against Plaintiff.

SCHMITTINGER & RODRIGUEZ, P.A.

BY: /s/ Nicholas H. Rodriguez
NICHOLAS H. RODRIGUEZ, ESQ.
414 S. State Street
Dover, DE 19901
Attorneys for Defendants

BY: /s/ William D. Fletcher, Jr.
WILLIAM D. FLETCHER, JR., ESQ.

DATED: October 29, 1977

EXHIBIT "A" TO ANSWER

LAW OFFICES
OF
BROWN, SHIELS & BARROS
43 THE GREEN
P.O. DRAWER F
DOVER, DELAWARE 19901

302-734-4766

April 23, 1974

Luna I. Mishoe, President
Delaware State College
Dover, DE 19901

RE: Dr. Columbus B. Ricks

Dear Dr. Mishoe:

I note from your letter of 1 April, 1974 that the meeting between yourself and Dr. Ricks produced no resolution of the problems connected with Dr. Ricks' tenuous position at the College. I therefore request, pursuant to the "Procedure For Presenting Matters To The Eudcational Policy Committee" rule contained on page 32 of the Delaware State College Faculty Handbook (1971 edition) that a meeting of the Educational Policy Committee be held to consider the grievances of Dr. Ricks. As you had advised me on the phone prior to your meeting with Dr. Ricks that you anticipated a failure to resolve his problems, I had not expected otherwise.

The subject to be discussed at the projected appearance before the Educational Policy Committee would include consideration of Dr. Ricks' tenure status over the last two years, the power inequitably wielded by certain individuals at Delaware State College in regard to Dr. Ricks' position, the history of his salary arrangements with Delaware State College since his arrival at the institution as well as the history of the Pre-service Science Teacher Training Program for Delaware State College, all of which matters I understand to have been discussed with you by Dr. Ricks at the meeting held in your office on 27 March, 1974.

In connection with the above projected meeting, it is requested that the committee which made the decision con-

cerning Dr. Ricks' tenure in March of 1973 be present with copies of the complete minutes of that meeting, insofar as such minutes, relevancy being determined by an independent party, relate to Dr. Ricks, as well as the committee which made the decision concerning Dr. Ricks' tenure in March of 1974, likewise accompanied by relevant minutes determined as stated. In this connection it is also requested that the Faculty Senate that reviewed the question of Dr. Ricks' tenure be required to attend.

In addition, in order that a complete determination might be made, it is requested that the following persons be required to attend at the date and time scheduled for the meeting:

1. Glenn D. Sturge, Director of the Media Center.

2. Ralph Hazelton, Component coordinator, Del-Mod Systems.

3. Dr. George W. McLaughlin, Chairman of the Education Department.

4. Dr. M. Milford Caldwell.

Since this meeting will involve matters of grave importance both to Dr. Ricks and to Delaware State College, it is requested that the hearing be held before the entire Board of Trustees and that all proceedings be recorded in such a fashion as to insure complete accuracy and later availability.

Thanking you for your consideration of this request, I am,

Very truly yours,

BROWN, SHIELS & BARROS

/s/ Edward R. McNamara

EDWARD R. McNAMARA

ERM:clk

EXHIBIT "B" TO ANSWER

June 26, 1974

Dr. Columbus Ricks
Delaware State College
Dover, Delaware

Dear Dr. Ricks:

On March 13, 1974, the Board of Trustees of Delaware State College officially endorsed the recommendations of the Faculty Senate in its March 11, 1974 meeting, at which time the Faculty Senate recommended that the Board not grant you tenure.

As we are both aware, the Educational Policy Committee of the Board of Trustees has heard your grievance and it is now in the process of coming to a decision. The Chairman of the Educational Policy Committee has indicated to me that a decision may not be forthcoming until sometime in July. In order to comply with

the 1971 Trustee Policy Manual and AAUP requirements with regard to the amount of time needed in proper notification of non-reappointment for non-tenured faculty members, the Board has no choice but to follow actions according to its official position prior to the grievance process, and thus, notify you of its intent not to renew your contract at the end of the 1974-75 school year.

Please understand that we have no way of knowing what the outcome of the grievance process may be, and that this action is being taken at this time in order to be consistent with the present formal position of the Board and AAUP time requirements in matters of this kind. Should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board.

Sincerely yours,

Walton H. Simpson, President
Board of Trustees of
Delaware State College

WHS:sra

cc: Members of the Board of Trustees

EXCERPTS FROM ORAL ARGUMENT IN THE DISTRICT COURT FOR THE DISTRICT OF DELAWARE ON DEFENDANTS' MOTIONS FOR DISMISSAL, DATED JUNE 16, 1978

MR. FLETCHER: Yes, your Honor.

Going to that area then concerning Title VII and the allegation of continuing discrimination, it would be the defendants' contention that given the holding of the United States Supreme Court in United Airlines v. Evans, that simple little isolated incidences of alleged discrimination in and of themselves by particular persons does not constitute a continuing pattern of discrimination, though there may be effects of the decision made that may go on into the future.

For instance, it would be our contention that any time a person is terminated from employment until the person is re-employed or until he comes into Court and has his rights remedied, there would be a continuing effect of which he would be injured by. And I think

the Court, in United States v. Evans, considered that and noted that it could not look beyond the actions themselves.

If we were dealing with a class of persons where the allegations existed that there were established policies that had been applied over the years to different groups of people, at all different times, then I think you would have a claim for a continuing violation of a person's rights.

But when there is one simple decision made, for instance in this case a denial of tenure, though the effect of that is that the person in the future isn't going to have tenure, we would maintain that that is one simple isolated action and decision, and that any cause of action accrued at that time.

In Evans the person was denied the right to have back pay and certain promotions. The decision was made on one particular day, yet the effects of that

decision went on obviously into the future since she was not receiving the amount of money she could have received in a higher position or with greater seniority. But the Court indicated that it would not consider that to be a continuing violation which would possibly toll the applicable statute of limitations in Title VII.

THE COURT: But I understand the plaintiff to be saying that United v. Evans, the recent Third Circuit case, does not present the same question that this case presents, that the United case and my old Jenkins case, I think it was, hold that if you have no violation within the statutory period, you can't recover simply on the grounds of the effects of a violation occurring before, not within the period of a present effect.

Perhaps that would be applicable here if all the complaint said was, "I was denied tenure for discriminatory reasons

in March or April of 1974." But I understand the plaintiff to say, "That is not all we allege, however. We allege that there was a continuing course of discriminatory acts from 1970 to 1975." They are a little bit vague on when those happened, and some of them obviously happened before the tenure decision. But assume that as a matter of fact there were discriminatory actions that were taken within the period, the three-year period, and within the 180-day period. I understand plaintiffs to say that in effect revives and allows you to get an amendment for all acts in that course of conduct, whether they occurred within the period or before the period.

Now, do you have some authority that you think is contrary to that proposition?

MR. FLETCHER: Well, I would think that the United Airlines case is contrary to that. I think that one of the under-

lying assumptions on a continuing pattern claim is that the same types of activities that have happened in the past are now continuing in the future.

I would think that if one type of decision were made in the past that was totally unrelated to another incident that happened six months later, that to simply say that that is discrimination and therefore there is a continuing pattern, that is not what the cases describing a continuing pattern of discrimination have found it to be.

I believe it is a continuing practice such as -- I think the complaint in this case might say something like, On one day he wasn't allowed to have a classroom, or on one day someone talked back to him, and then he was also denied tenure three years ago. I don't think those things have a relationship to one another that would constitute a continuing pattern. And that

would be one of the bases to distinguish the continuing pattern from the incidents that are alleged in this case.

Your Honor mentioned the Jenkins case. From my reading of the case it indicated that there were a lot of different individual activities that occurred, or at least are alleged to have occurred by the two complaining plaintiffs in addition to the fact that they were actually terminated from employment. I believe that they made claims such as their work conditions weren't the same as others or that they were having trouble with the shop stewards on and off.

THE COURT: But there wasn't any employment discrimination against them after they were discharged, was there?

MR. FLETCHER: I think that is correct.

THE COURT: I don't remember the case, but I assume that is the case.

MR. FLETCHER: That is correct. They weren't after they were discharged. But it would seem to me that the plaintiff at least would have to show in the present case, given the pleadings, particular acts of discrimination occurring after October 7, 1974, to even open up a Title VII action.

The complaint was filed on April 4, 1975, and moving back 180 days I come to October 7, and I don't believe there is anything in the complaint that a fair reading of the complaint indicates there was anything that happened after October 7, 1974, that would allow the Court to consider Title VII, and I would think that the Court would have to take a look, if there is any action -- if they amended their complaint to allege some type of activity after October 7, it would be our contention that it has to have some type of relationship to the acts that

happened beforehand before they would be entitled to relief for the acts that happened before October 7.

I think the Evans case indicated that a person is free to treat actions that they take against one if it is not brought to the attention of D.C. within the time limits as a legal act. And we would maintain that in this case, when you are having isolated decisions, such as a denial of tenure, which was made in 1974, that if he had an incident with another teacher, even with his Chairman a year later, that there is no relationship there that would allow the Court to consider -- that would open up the entire five-year history again. That would be our contention.

I think that the Evans case would support that. She may have had other problems in Evans and the Court was not

going to allow them to consider anything that went to her termination because it wasn't timely filed.

It is difficult for me to give you an example, your Honor, in that we have no examples of discrimination occurring after October 7, 1974, in the pleadings that I can read from them. I think the Meyers case that we cited indicated that when you have discrimination, if the discrimination decision has already been made, a re-application for the person to decide it again is not enough to open up the claim and allow it to come in, even though the original denial would have been barred by the statute of limitations.

So the actions that are alleged in the complaint where the plaintiff says in December 1974, he asked the President to reconsider his tenure status, I don't think the mere reaffirming of a decision

that was already made, which he is complaining of, would be sufficient to reopen the case.

Of course, we also contend that the President has no authority to change the decision of the Board of Trustees, but the allegation was that he went to the President and asked that even though the tenure decision had been made, that he change it. And I wouldn't think that that would be sufficient to open up the case again. I think the Meyers case supports that.

THE COURT: Is not the continuing violation theory or rationale applicable in 1981 and 1983 actions as well as Title VII actions in connection with the application of statutes of limitations by analogy?

MR. FLETCHER: I think it probably would, your Honor. I can't think of any reason that if the type of conduct that is

being complained of is of a type where the Court has determined that the statute of limitations doesn't run on it, then perhaps it would be analogous, although I would point out that this Court in the Blake case recently had an opportunity to talk about civil conspiracies, and there were specific actions complained of which were outside the applicable statute of limitations, and therefore the initial act was barred, and the Court noted that the effects and damages of this may go into the future, but as far as determining what statute of limitations applies, it is going to apply the one from the overt acts.

So that would indicate perhaps that the continuing violation is not to be as broadly construed in a regular cause of action under a Civil Rights statute as opposed to a Title VII, which most of the courts have recognized to be extremely proper in giving the relief allowed.

THE COURT: Or, conversely, perhaps the Blake analysis may help us in applying the continuing violation rule. I mean, what I understood the judge to say in that case was that you cannot collect in a civil conspiracy case where you have got a continuing series of conduct, you can't collect damages for any overt act that did not occur within the period.

MR. FLETCHER: Yes, your Honor. Well, I think that we would not argue that point. Anything outside of the statute could not be recoverable. In other words, it seems to me the statute of limitations is barring the remedy, and that is what we are claiming, that the acts outside of the statute, there is no remedy for them.

THE COURT: But if you apply that to this case, the argument about a continuing pattern of discrimination, it would mean that assuming that some violations did occur within the period and

therefore that the plaintiff's suit is not barred, the plaintiff might seek injunctive relief and damages for violations occurring within the statutory period; nevertheless, he could not recover damages or get reinstatement relief for acts that occurred before the period, that is, for the decision not to renew and not to grant tenure. But I am not sure that that is consistent with the way the cases have applied the continuing discrimination doctrine.

It seems to me the legal issue that is posed here is, assuming that there is a continuing course of discrimination and there is a violation or violations within the statutory period so that you have a claim you can press, you can come into Court and you can seek injunctive relief, whether or not in that suit you can recover damages for the effects of violations that occurred prior to the period.

MR. FLETCHER: I see what you are saying, your Honor, and we would contend you could not, on the basis of the Evans case, which held that the legal effect of acts not within the period bar that they are legal acts, and that therefore if they are legal acts, there is no right to a remedy. That would be our position.

THE COURT: They did say that. I am not sure the Court held that. I mean, it was a different case -- I think you would agree with me -- it was a different case because there was no violation within the period, in the Evans case.

MR. FLETCHER: Your Honor, at this point I would not agree on the basis that I haven't seen a violation alleged in the complaint within the applicable period, as far as Title VII is concerned. That would be our contention.

THE COURT: And you say that is jurisdictional, so we ought to make,

regardless of whether the allegations of the complaint, the general allegations that there was discrimination between '70 and '75, would otherwise be sufficient, that is the jurisdictional point and we ought to make the plaintiff put his stake down and tell us what act, if any, in fact occurred after September 9, 1974, and what act happened after October 7 of '74 as far as the Title VII is concerned; is that right?

MR. FLETCHER: As far as Title VII is concerned, I would agree as far as the date of October 7 is concerned. I am not sure I understand the September 9 date as far as Title VII is concerned.

THE COURT: Well, you told me that the theory of continuing discrimination might apply in the case of 1981, '83 and '85 claims.

MR. FLETCHER: Oh, yes, your Honor.

THE COURT: And assuming a three-year statute of limitations, September 9, 1974, would be three years before the filing.

MR. FLETCHER: It would, your Honor. Of course, the defendants have taken a poisition that the applicable statute of limitations, if there is an action even alleged, would not be a three-year statute of limitations.

THE COURT: I can understand why you didn't pick up my reference, that is right. Go ahead.

MR. FLETCHER: Is there any additional discussion you wish to hear on the Title VII portion? I think I have outlined our position on that.

THE COURT: Is there a formal grievance? The briefs talk about grievance procedure. Is there a formal grievance?

MR. FLETCHER: Yes, there is, your Honor. There is an outlined grievance procedure.

THE COURT: Is it in a collective bargaining agreement?

MR. FLETCHER: I don't believe it is.

THE COURT: Faculty handbook?

MR. FLETCHER: Yes, a handbook. It is outlined basically the same way as the tenure rules and regulations are outlined that we attach to one of our briefs. The grievance procedures would be outlined in a handbook similar to that.

THE COURT: What is the final step in the grievance procedure?

MR. FLETCHER: As I understand it, your Honor, it would be the hearing before the Educational Committee. I believe that is what they are called.

THE COURT: Is the grievance procedure in this record in this case?

MR. FLETCHER: Your Honor, there is a small reference to the hearing given to the plaintiff by the Grievance Committee, or Educational Committee, which occurred in May of 1974. We contend that there are absolutely no allegations in the complaint that challenge in any way the grievance procedure or the hearing that was given the plaintiff at that procedure.

The record at this time does not indicate that the procedure was in fact a hearing that was transcribed, at least by tape recording, that the plaintiff was there with counsel --

THE COURT: The purpose of my inquiry was to find out whether the Educational Committee's decision was the final step of the grievance or whether a full Board reconsideration was the final step in the grievance procedure.

MR. FLETCHER: The decision of the grievance procedure Board would be sent on

to the Board of Trustees. The Board of Trustees then acts as it wishes in light of the decision of the Grivance Committee.

THE COURT: All right. I think that exhausts my questions, but I don't want to cut you off if you want to add anything.

THE COURT: So that I won't forget it, why don't we start with his last point. Is there really any reason why the members of the Tenure Committee ought to be in this suit in their individual capacities?

MS. HARRIS: Yes, your Honor, I think there is. If the concern is with respect to the statute of limitations, I believe that the question of when Dr. Ricks knew or had actual knowledge or should have reasonably had knowledge of the nature of what he perceives to be the conspiracy against him is one yet to be determined.

The complaint that was drawn was drawn after all of this had occurred and based on knowledge that he then knew at the time that he met with me and we prepared the complaint. Much of the information that came to Dr. Ricks' attention -- and I am not suggesting to the Court exactly which of the information it is; I don't want to mislead the Court in that was -- came to his attention after he visited the Equal Employment Opportunity Commission, after it had completed its investigation in this matter, that he made two visits to the EEOC. One of them was in November of 1975, to be interviewed by the investigator. The second was in June or July, perhaps May of 1976.

If you assume the two-year statute of limitations ran from that second visit when he did in fact review documents, then he may well be within the period provided

for by the statute of limitations. For that reason I think it is premature to dismiss that claim on that basis of the statute of limitations.

There is one other thing I would like to say about the conspiracy claim, the conspiracy allegation, that was raised that has not been referred to, and that is the question of whether the individuals were capable of conspiring. The cases that I cited in my brief were cited for the purpose of showing -- they are not directly on point, but they are suggestive of the kind of inquiry the Court should make to determine whether a conspiracy is capable of occurring.

Since the time of the filing of the brief a case has been decided by Chief Judge Northrop in Maryland. The name of the case -- I presented copies to counsel this morning and I apologize for not having presented it earlier but it just

appeared in the FEP Reporter System -- it is Hodgin v. Jefferson, decided March 13, 1978, the District of Maryland. Judge Northrop finds in that case where he refuses to dismiss a conspiracy claim involving employees of a corporate defendant on the grounds that perhaps if their actions were authorized they might be incapable of conspiring; if their actions were unauthorized, the question remains open. And for that reason he refused on a preliminary basis to dismiss it.

I would suggest the same reasoning would apply in this case to that claim.

I would like to go back to the Title VII claim and the question of continuing violations. I believe that the complaint alleges a course of conduct on the part of the defendant that constitutes a continuing violation, and with respect to the Defendant College's contention that no act

occurred after 10/7/74 -- I believe that is the date -- that was alleged to be discriminatory, I believe that the allegation that Dr. Ricks was discharged effective June of 1975 is that act. That act having occurred after 10/7/74, I believe that it is the logical consequence of the continuing pattern, or the logical following of the continuing pattern of discrimination against Dr. Ricks.

The Court earlier asked whether there was any act after, I believe, 9/12/74 --

THE COURT: 9/9/74.

MS. HARRIS: 9/9/74. There was a decision, I believe a letter of the Educational Policy Committee of the Board of Trustees issuing its decision -- I believe that letter is dated 9/12/74.

So with respect to whether there was any act that occurred at that point in time, there was. The action of the Board

of Trustees would have necessarily, as the procedure described by Mr. Fletcher would indicate, would have followed that.

THE COURT: As far as the other incidents or episodes referred to in the complaint are concerned, other than the termination of employment in June of '75, did any of those instances occur after October 7 of '74 other than the instance of termination? There was a letter, I believe, from Dr. Mishoe in January of '75 which indicated the decision of the Board of Trustees.

Now, as to when that decision was made, I have no document indicating that exact date. I was going to say that I believe the nature of continuing conduct is similar to the conduct that your Honor found to be continuing in the case of Stallings v. Container Corporation that was recently reported in the FEP series, that in fact there was a pattern of

conduct engaged in against the individual plaintiffs and that there was in fact an act which occurred within the period of time of the filing of the charge and notwithstanding the fact that there was actually no position to which the plaintiffs could have been promoted within the time period in that instance -- which I believe was 210 days of the filing of the charge -- the fact that that practice continued and the plaintiffs were still subject to that conduct led the Court, I believe, to conclude that the conduct was continuing in nature and found the violation. And the Court also granted relief going back to years prior to the filing of the charge.

I believe that when you are talking about this kind of conduct on the part of the college, you are talking about a similar kind of conduct. Dr. Ricks' real complaint ripened and became a reality on

the date of his discharge. One might say that it would be desirable to have tenure because of the permanency of it. But if Dr. Ricks had never actually been discharged, the absence of tenure itself, the denial of tenure that occurred in the earlier stage is not necessarily the direct injury causing it, the loss of his position on June 1, 1975.

THE COURT: Well, how about June 26 of '74, when he was notified that he would be given a terminal --

MS. HARRIS: That notice, that letter from the Chairman of the Board, I believe Mr. Simpson, indicated that it was given as a matter of form because the Educational Policies Committee still had his matter under consideration and had the power to decide to grant him tenure -- excuse me, to recommend to the Board of Trustees that he be granted tenure. So the question of tenure to Dr. Ricks was still open at that time.

I wanted to comment with respect to the 1981 matter, and I don't want to belabor the point, but I think the cases I have cited indicate there is some racial connection to the national origin discrimination alleged that such a claim is redressable under 1981, and I think it is important that the Court should know that Dr. Ricks alleged in his complaint and had alleged in his EEOC charge that he is a Liberian. To him by definition a Liberian is someone who is racially black. One is not a Liberian unless one is, I suggest to the Court, not closer in connection to national origin connection discrimination than to emphasize in this case.

THE COURT: I am not quite sure what you are telling me. The complaint seemed deliberately -- it is alleged that he was black -- deliberately and precisely drawn to make a claim of national origin

discrimination. Are you telling me that Dr. Ricks is also making a claim of racial discrimination?

MS. HARRIS: No, I am not saying that. I am saying I believe the cases hold that national origin discrimination is redressable under 1981 if racially connected, and I am simply saying the allegation in the complaint was he was a black Liberian -- it may have said "male" -- but a black Liberian. I am saying to you that to be a Liberian is to be racially black and that you couldn't get closer in terms of national original discrimination, you couldn't make that closer racial national origin connection than you could in this case.

Some of the cases have been Hispanic cases, and the courts have decided -- and I believe I have cited two in my brief -- that have actually made decision and decided that 1981 violations had occurred.

One was Castro v. Beecher, the other Davis v. County of Los Angeles, both public employment cases, where the plaintiffs were in one instance Spanish surnamed and in the other instance allegedly Hispanic the Court found there violations of 1981.

The other cases' discussion of whether you can find a 1981 violation on the basis of national origin indicate that you can if it is connected, if it is closely affiliated with race. And I am simply saying to the Court that in this case that close connection does exist. I am not asserting that he is alleging a race discrimination claim.

With respect to the other claims, I believe that the Title VII claim is one alleging a continuing pattern of discrimination which continued up to the date of Dr. Ricks' actual discharge in June of 1975. He filed his charge in April of 1975 with the Equal Employment Opportunity

Commission. I believe that the Equal Employment Opportunity Commission determination, which the defendants have received a copy of, indicates the scope of the investigation of that matter and that they looked at it as a pattern of discrimination and their finding -- I am not offering it, I am not suggesting to the Court that it be bound by that finding -- I am simply saying that they looked at it in such a way that would lend itself to be conceived of as a pattern or practice of discrimination. The pattern and the practice with respect to a Title VII claim came to a head at the time of his discharge.

I think that the other claims arise out of the same facts, the 1983 claim and the 1985 claims, arise out of the same facts of Title VII that the 1981 claims arise out of. And I think at this point it is premature to dismiss those claims on

the basis of their being barred by the various statutes of limitations because I don't think that the Title VII claim is so barred, and I believe that the Court could at a later point, after discovery is concluded, issue such an order, whether that order be to dismiss certain of those claims because they are in fact barred or to shape relief of the outcome if relief is in order or to take those various facts into consideration.

I am asking that the Court not now dismiss those claims on the basis that they are barred by the statutes of limitations because I believe the Title VII claim is still viable and a continuing one.

THE COURT: I am sort of troubled -- though I read some cases that appear to me to say so, I am troubled by the idea that when you have a continuing series of violations over a long period of

time, and one occurs within the statutory period, that it revives the claims for all prior violations, revives those claims just as though there was no statute of limitations, and I have trouble reconciling that, because it seems inconsistent with the purposes to be served by the limitations statute.

Now, when you are talking about equity claims, if there is a continuing pattern of racial discrimination, for example, and there is an act that occurs within the period, and it appears to the Court that there is a threat of future violation, there has never been any limitations period. Limitations are technically not applicable and of course any Court is going to enjoin a promotional scheme or any other kind of employment practice that discriminates against employees that are going to be there and are still suffering under it.

I am having trouble coming up with a hypothetical -- I am concerned about a rule -- is it the law that if you have a continuing series of discriminatory acts and one happens within the 180-day period, that you can collect damages resulting from another act that occurred prior to the 180-day period?

MS. HARRIS: Yes, going back two years, with a proviso that it not go back beyond two years prior to the filing of the charge.

THE COURT: Now, how about a 1983 claim with, let's say, a three-year statute of limitations? You have got a series of acts, discriminatory act, violations, but only one within the three-year period. Now, clearly the plaintiff doesn't get thrown out of Court, but can he or she collect damages for the effects of a violation occurring more than three years earlier?

MS. HARRIS: I believe that the plaintiff could because I think that the question that has to be asked with respect to the statute of limitations is, is the cause of action barred rather than is the right to relief barred, and I think that if the violation continued and the cause of action is outstanding, that the plaintiff in that case is entitled to the relief, all the relief that would redress whatever that cause of action is, and the cause of action was viable because it was in existence within the statutory period.

THE COURT: I haven't found any law on it. There is, of course, law that says you can go back -- in a Title VII case you can go back to the two-year period.

Well, let me ask you this: Suppose your client had come to the Clerk's office of this Court in March of 1974 with a paper that said that plaintiff hereby

alleges that he was denied -- well, let's make it June 26; I don't know that it makes any difference -- let's make it April; and he says, There has been a decision to deny me tenure because of my national origin. Would the defendants have any basis for urging the Court to tell him to go away, he wouldn't have a right to be there?

MS. HARRIS: I believe it would. I believe that the defendant would have the right to say that that decision, as of the date you indicated, that decision was being considered by the authorities who had power to ultimately make that decision, and that it was only at the time that that decision was actually made when the Board would say either Yes you do get tenure or No you do not get tenure -- that that decision is final.

THE COURT: Let me make sure I do have the facts straight. The Board did

vote in April of '74 to accept the recommendations of the Tenure Committee and not to grant tenure. Then the grievance procedure started. Would you straighten me out?

MS. HARRIS: The grievance procedure, as I understand it -- I don't think that there is a document in the record that fully outlines it -- what happened with respect to Dr. Ricks was that the request for grievance -- I am not sure you can call it grievance procedure -- the request for consideration by the Board was made prior to that letter from -- and I am not certain -- I would have to look at the record -- that it is a statement that the Board decided not to grant tenure. But assuming it is, his request pre-dated that, and the only matter at that time was the scheduling of a hearing, that educational policy hearing, and that Educational Policy

Committee had the power to recommend that tenure be granted or denied. That recommendation was made in September, and sometime after that the Board made its decision, after September of '74.

I think what is clear here is that the Board had the power and did exercise the power to decide to grant Dr. Ricks tenure after that particular letter. I think the college could have said at that time, notwithstanding that letter, We are considering this matter. The decision is yet to be made. Dr. Ricks has requested this consideration.

THE COURT: There is another little bit of factual confusion that I want to make sure I straighten out. There is an allegation in the complaint that I read saying that the Plaintiff was discharged on June 1, of 1975. That is not accurate, is it?

MS. HARRIS: It is effective.

THE COURT: The briefs talk about the contract expiring and his employment terminating on June 30 of '75. I take it that is what happened?

MS. HARRIS: Yes, yes, that is correct.

THE COURT: How do you distinguish the Blake v. Delaware City case?

MS. HARRIS: As I understand that case, first of all, it was not, as I understand it, a discrimination case, and it was one where there were a series of isolated acts or factual events which the plaintiff lumped together and said this was a conspiracy. I think that that is different here. I think everything here arises clearly out of a claim -- comes under the aegis and is protected, is the kind of conduct against which the plaintiff is protected from harm by Title

VII. I just think that the events are much more closely connected and a different set of facts.

THE COURT: Stallings, of course, was a promotion case, and if you are an employee in a sense you are constantly being adversely affected by a promotional system that discriminates. Isn't a denial of tenure and the issuance of a terminal contract something different?

MS. HARRIS: I don't believe so. I think it is analogous to a situation if you had a promotion system, for example, that was dependent on evaluations of employees by supervisors, and the employees got bad evaluations, that that claim for discrimination would not ripen until such time as a promotion was available and was denied.

I think it is analogous to that situation, that Dr. Ricks had the series

of events that occurred to him that put him in a position to be fired, because of the absence of tenure in June of 1975.

I don't know if that response to your question, but that is the way I perceive it.

THE COURT: All right. I don't have any further questions. But you are --

MS. HARRIS: I think that I have covered that which I wanted to cover. I believe the Defendant College has a copy of the EEOC determination. I wanted to pass one up, again not for consideration of the substance of it but rather for the scope of it, in support of the proposition that it is continuing.

THE COURT: Thank you.

Do you have anything in rebuttal, Mr. Fletcher?

MR. FLETCHER: Just a few comments, your Honor, if I may.

One of the issues that was discussed just a moment ago concerned the grievance procedures, and I believe the Court's question was whether or not Dr. Ricks could have come into the Court or into the Clerk's office and filed a complaint of discrimination back in March or April of 1974, for the decision to terminate him from employment. I believe plaintiff maintained that he couldn't, and indicated that the basis why he couldn't was because of the existence of the grievance procedure, and that there wasn't any final --

THE COURT: I am not sure whether she said that -- I thought she said that he couldn't because there wasn't a final decision.

MR. FLETCHER: There wasn't a final decision, and I think the reason why there wasn't a final decision is because there

was still the grievance procedure to go through and then another decision by the Board. I think that was her reasoning. And in light of that, I would offer to the Court the case of International Union of Electrical, Radio and Machine Workers v. Myers, United States Supreme Court case that I have cited at 50 Lawyers Edition 2d 427, where the Court did discuss the effects of grievance procedures and the filing of a complaint with the EEOC, and I believe that the Court indicated that the statute of limitations for an EEOC complaint is not tolled by the mere existence of a grievance procedure.

THE COURT: When was the Myers case decided?

MR. FLETCHER: 1976 -- December 20, 1976.

THE COURT: Go ahead.

MR. FLETCHER: And on that basis, your Honor, as far as the grievance

procedure is concerned, we don't think that that does toll the beginning of the cause of action and the necessity to file the same.

It is a similar reasoning to the reasoning in I believe it is the Johnson case in the Supreme Court where the actual grievance procedures within the EEOC do not toll the running of the statute on a 1981 action.

So I think that that is consistent and that we would claim that the decision was made in March.

I would also bring the Court's attention to the Aumiller v. University of Delaware case -- I am sure the Court is familiar with it -- but in the factual situation they had a grievance procedure and I believe the Court never really decided what particular time period would be the determining one, but it did indicate that it found a cause of action

to exist prior to the initiation of the grievance procedures, though the contract that he had was going to run to the end of that year. He was being informed of his termination, he had time to file a grievance, and there is still time on his contract. The Court held that a cause of action arose during that contract year, and I believe the judgment was awarded on what was done during that year. So I would again suggest that it would indicate that the cause of action is not dependent on the completing of the grievance procedures.

We would also indicate that there is nothing in the complaint that challenges the grievance procedures. Nowhere has any of the individuals or the Educational Policy Committee itself, the hearing it conducted and the decision it made has not been challenged in any way claiming that

that decision was discriminatory. And that decision was that the person should not be given tenure.

The other comment made by plaintiff concerned the continuing violation pattern, and she indicated that the determining date was June 1975, because that was when the plaintiff was discharged. We maintain that there was a contract that terminated in June of 1975, which was entered into and fully performed. The fact that there were no additional contracts after June of 1975 was not the effect of the contract that ran through June but rather was the effect of the decision not to grant tenure, which was back in March or the summer of 1974. Therefore the fact that you didn't have a job after June is merely an effect of a decision that was made many months before and is not part of the continuing violation. It is nothing more than the

effects of being denied a promotion, as in Evans, they were denied the promotion, so in the future she wasn't receiving additional compensation.

With those comments, I close, your Honor.

EXCERPTS FROM RESPONDENT RICKS' BRIEF IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE ISSUES

I. Did the District Court err in deciding that the critical date for purposes of calculating the statute of limitations governing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 et seq., as amended, was the date when plaintiff was notified of his termination contract by the Board of Trustees of the College rather than the date his employment ceased.

II. Did the District Court err in deciding that the critical date for purpose of calculating the statute of limitation governing 42 U.S.C. §1981 was the date when plaintiff was notified of his termination contract by the Board of Trustees of the College rather than the date his employment ceased.

B. THE DISTRICT COURT ERRED IN DECIDING THAT THE CRITICAL DATE FOR PURPOSES OF CALCULATING THE STATUTE OF LIMITATIONS GOVERNING 42 U.S.C. §1981 WAS THE DATE WHEN PLAINTIFF WAS NOTIFIED OF HIS TERMINATION CONTRACT BY THE BOARD OF TRUSTEES OF THE COLLEGE RATHER THAN THE DATE HIS EMPLOYMENT CEASED.

Plaintiff does not dispute that the statute of limitations applicable to plaintiff's §1981 claim is three years and that 10 Del. C. §8106 is the appropriate statute. However, plaintiff believes the District Court erred in holding that the statute commenced to run on June 26, 1974,

when· plaintiff was notified of his terminal contract (A-91). Although Title VII and 42 U.S.C. §1981, provide separate, independent remedies for employment discrimination, the same facts may give rise to those separate and independent claims. Johnson v. Railway Express, 421 U.S. 454 (1975). Plaintiff believes that the arguments made above with respect to the timeliness of the charge in April, 1975, filed under Title VII are relevant and applicable with respect to his claim for relief under 42 U.S.C. §1981 as well.

Plaintiff's §1981 claim alleges national origin discrimination. Among the alleged violations of that statute is one that plaintiff was discriminatorily discharged from his employment. On the basis of Egleston, supra, and Noble, supra, his date of discharge clearly was the final day of his employment contract, June 30, 1975. Plaintiff believes that any §1981

claim to be filed based on this allegation had to be filed within three years of that date, or before June 30, 1978. As plaintiff's court complaint was filed in September, 1977 (A-2), it is apparent that it was filed within the three year statute of limitations provided for in 10 Del. C. §8106. Accordingly, plaintiff urges this court to reverse the District Court's holding that this claim is time barred.

ORDER OF UNITED STATES SUPREME COURT GRANTING PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 79-939

Delaware State College, et al.,

Petitioners,

v.

Columbus B. Ricks,

Respondent.

ORDER ALLOWING CERTIORARI. Filed February 19, 1980.

The Petition herein for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit is granted, limited to questions 1, 2 and 3 presented by the Petition.

Supreme Court, U. S.
FILED
JAN 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners
[Additional Petitioners listed inside cover]

v.

COLUMBUS B. RICKS, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JAMES H. WILLIAMS,
WILLIAM S. YOUNG,
BURT C. PRATT,
LUNA I. MISHOE,
PIERRE S. DUPONT, IV,
M. MILFORD CALDWELL,
GEORGE W. MCLAUGHLIN,
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HARRIET R. WILLIAMS,
ARTHUR E. BRAGG,
ORA BUNCH,
EHSAN HELMY,
VERA POWELL,
JOHN R. PRICE,
HERBERT THOMPSON,
W. RICHARD WYNDER,
ULYSSES WASHINGTON, and
JANE LASKARIS.

M. MILFORD CALDWELL died on October 27, 1979.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners

v.

COLUMBUS B. RICKS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for Respondent In Opposition

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit which is reprinted as pages 1a through 18a of the appendix to the petition is reported at 605 F.2d 710 (1979). The opinions of the United States District Court for the District of Delaware are reprinted at pages 20a through 43a and pages 45a through 51a of the appendix to the petition. Neither of the opinions of the United States District Court for the District of Delaware is reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 19, 1979. The jurisdiction of this court is invoked under 28 U.S.C Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that respondent filed a timely charge of discrimination thereby meeting the time limitation requirements of 42 U.S.C. Section 2000e-5(e).

2. Whether the Court of Appeals erred in holding that an alleged denial of tenure by petitioner, an academic institution, is a process which constitutes a continuing violation.

3. Whether the Court of Appeals erred in holding that respondent had filed the court complaint below alleging national origin discrimination under 42 U.S.C. Section 1981 within the time provided for by the state statute of limitations governing such claims.

4. Whether the Court of Appeals erred in remanding to the District Court the question of whether national origin claim may be raised under 42 U.S.C. Section 1981 for an initial determination of that issue.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 42 U.S.C. Section 2000e-5(e) cited at page five of the petition and 42 U.S.C. Section 1981 found at page six of the petition.

STATEMENT OF THE CASE

Respondent, a black male Liberian was employed by petitioner from 1970 to 1975 as a Professor of Education and Coordinator of Science Education. In February, 1973, he was denied academic tenure, but was given another one year contract. In February, 1974, the petitioner's Committee on Promotions and Tenure again recommended that respondent be refused tenure. The petitioner's Board of Trustees met on March 13, 1974 and accepted that recommendation. In April, 1974, respondent filed a grievance with the Educational Policy Committee of petitioner. In May 1974, that Committee, after conducting a hearing, determined that the denial of tenure was proper. In June, 1974, the petitioner's Board of Trustees notified respondent that he was being given a terminal contract for the school year that ran from September 1, 1974 through June 30, 1975. Respondent ceased to be employed with the college on June 30, 1975.

On April 4, 1975, respondent filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). On June 6, 1977, respondent was sent a right to sue letter by the EEOC. On September 9, 1977, respondent filed a complaint in court. The relevant portions of the complaint allege that he has been discriminated against on the basis of national origin in violation of 42 U.S.C. Section 2000e-5(e) (Title VII) and 42 U.S.C. Section 1981 (1981).

The United States District Court for the District of Delaware dismissed the Title VII claim on the basis that respondent failed to file a charge with the EEOC "within the 180 days after the alleged unlawful employment practice occurred" as required by 42 U.S.C Section 2000e-5(e). The District Court also dismissed the Section 1981 claim as barred by the three year Delaware statute of limitations governing such claims. The District Court also dismissed

several other claims alleged by respondent. Respondent took an appeal from the District Court's dismissal of the Title VII and Section 1981 claims only. On September 18, 1979 the United States Court of Appeals for the Third Circuit entered a judgment reversing the dismissal of the Title VII and 1981 claims and remanding the matter for proceedings consistent with the opinion of the Court of Appeals. It is to review that judgment that petitioner seeks a Writ of Certiorari from this Court.

REASONS FOR DENYING THE WRIT

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT REVERSING THE DISTRICT COURT ORDER DISMISSING RESPONDENT'S COMPLAINT IS NOT A FINAL ORDER

The effect of judgment of the United States Court of Appeals for the Third Circuit is to remand the Title VII and 1981 claims for reinstitution in the District Court of respondent's case on those issues. As a consequence of the Court of Appeals' order, discovery and trial on the merits of this claim will follow. This Court has held that only final orders are reviewable by certiorari and that a final order is one which disposes of a claim in such a way that no further action is required. *Rodgers v. Hill,* 289 U.S. 582 (1933); *Moore v. The New York Cotton Exchange,* 270 U.S. 603 (1926); *Gulf Refinery Company v. U.S.,* 269 U.S. 125 (1925).

In the instant case the order of the Court of Appeals has not finally disposed of the claim and clearly requires further action. For that reason, petitioner is precluded from seeking review of that order by this Court. Moreover, the fact that this Court has stated that the timely filing of a charge with the EEOC is a jurisdictional prerequisite to suit, as it did in *Johnson v. Railway Express Agency, Inc.,*

421 U.S. 454 (1975) does not create an exception to the principle that this Court will only consider exercising its discretion to grant certiorari where there is a final order. *Catlin v. United States,* 324 U.S. 299, 236 (1945). Specifically, this court has held that an appellate court decision that reverses the decision of a trial court and requires further proceedings is not a final order and is not reviewable by way of certiorari. *Southern Pacific Company v. Gileo,* 351 U.S. 493, 495, 496 (1956). As the identical procedural situation exists here that existed in *Southern Pacific v. Gileo,* this court should deny the writ.

ASSUMING ARGUENDO THAT THE COURT OF APPEALS' ORDER IS A FINAL ORDER, NO TRUE CONFLICT EXISTS AMONG THE CIRCUITS

Petitioner argues that the ruling of the United States Court of Appeals for the Third Circuit is in conflict with rulings of the Ninth, Fourth, Fifth and Eighth Circuits. When one examines carefully the cases cited by petitioner, it is apparent that any conflict between these circuits and the Third Circuit, if any exists at all, is in fact either superficial with respect to a conflict with the Ninth Circuit or results from a misinterpretation of the courts' decisions, by the petitioner with respect to the decisions of the Fifth and Fourth and Eighth Circuits.

Specifically, petitioner cites the case of *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979) as being in conflict with the decision of the Court of Appeals in the instant case. A careful examination of both cases reveals that in fact on substantially similar, though not identical facts, they have been disposed of by each circuit in a similar way. In *Abramson,* the Ninth Circuit reversed the District Court's grant of a motion for summary judgment against the plaintiff and by doing so, effectively accorded the plaintiff in that case the opportunity for a trial on

the tenure process. Petitioner relies on language quoted from *Abramson* which indicates a disagreement with cases decided by District Courts within the Third Circuit as the basis for arguing that there is a conflict between the decisions of the Ninth and Third Circuits.

In effect, the decision in *Abramson* is similar to that reached below and no real conflict exists. In *Abramson*, the Court of Appeals remanded the case to allow the plaintiff the opportunity to prove that in fact the violation alleged did continue after the effective date of the act, *i.e.*, March 24, 1972. In reality this result is no different from the result of the Court of Appeals in the instant case where the respondent will be afforded the opportunity to demonstrate the actual continuing process by which tenure was denied him and by which his employment was terminated within 180 days of the filing of his charge with EEOC.

Bracamontes v. Amstar Corporation, 576 F.2d 61 (5th Cir. 1979) and *Farris v. Board of Education of St. Louis*, 576 F.2d 765 (8th Cir. 1978) arose on a set of facts similar to facts in *Masco v. United Airlines*, 547 F.2d 1127 (3rd Cir. 1978) in which the Third Circuit reached a conclusion similar to that of the Fifth Circuit in *Bracamontes* and the Eighth Circuit in *Farris*. In all three of these cases the Courts of Appeals found where there was a hiatus of more than 180 days between the time the plaintiffs ceased to be employed or were laid off because of alleged discrimination by the employer, and the alleged subsequent act of discrimination, which new act was not in itself alleged to be discriminatory, the claim should be dismissed as untimely. All three of those courts followed the holding of this Court that the present effect of past discrimination which occurred more than 180 days before the filing of a charge with the EEOC was not redressable in a court suit. *United Airlines v. Evans*, 431 U.S. 553 (1977).

Clearly, the Third Circuit in the instant case has made a distinction between the factual situation in *Masco*,

Bracamontes, and *Farris* on the one hand, and the factual situation in the present case which is similar to the circumstances in *Abramson* where similar results were achieved on similar reasoning by the Court of Appeals.

Moreover, the decision of the Third Circuit below is consistent with decisions of the Second Circuit on this issue of timeliness of charges raising the issues of discriminatory denial of tenure and promotion in a similar factual context. *Egelston v. State College at Genesco*, 535 F.2d 752 2nd Cir. 1976) and *Noble v. University of Rochester*, 535 F.2d 756 (2nd Cir. 1976)

Martin v. Georgia Pacific Corporation, 568 F.2d 58 (5th Cir. 1977) cited by petitioner to demonstrate a conflict between the Fifth and Third Circuits raised the issue of the timeliness of a Title VII charge on a decidedly different set of facts. In that case the plaintiff, unlike the instant case, conceded by deposition testimony that:

1. the alleged discriminatory acts were not continuing and
2. that no act of discrimination had occurred within the satutory period of time required.

Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) also cited by petitioner for the purpose of showing a conflict between the Fourth and Third Circuits does not present a real conflict between the circuits as the Fourth Circuit simply acknowledged in passing the rule that to be the basis of a court action, a charge of discrimination must be filed within 180 days of an act of discrimination. In *Friend*, the court merely identified the fact that with respect to the issue of testing, as it allegedly discriminated against black firemen, the court would only consider tests given within 180 days of the filing of the charge with the EEOC. It is not evident from the opinion, whether other tests were alleged to be discriminatory or whether plaintiffs alleged

that the testing of the defendant fire department constituted a continuing discrimination pattern against black firemen. In view of the ambiguity of the basis of the court's decision on this issue, and in the absence of a clear indication that the court was making a determination that no continuing violation existed, petitioner's reliance on this case in support of its proposition that a true conflict exists is unfounded.

Petitioner also cites *Myers v. Pennypack Woods Home and Ownership Association*, 559 F.2d 1127 (3rd Cir. 1978) and *Masco v. United Airlines, supra*, in support of the proposition that actions that do not occur within 180 days of the filing of a charge with EEOC or of a court complaint under a federal fair housing statute[1] are time barred. Those cases do support that proposition, however, it is clear that both cases are Third Circuit cases, that the Third Circuit below was aware of both of the cases, and indeed expressly ruled that the instant case was distinguishable from the ruling of *Masco* on the basis of the facts of the case. Even assuming for the sake of argument that the cases are inconsistent with the instant case, they represent an intra circuit inconsistency, and as such, are not of such significance that requires review by this court.[2]

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1. U.S.C. 3612(a), Section 3612(a) provides in pertinent part:

> (a) The rights granted by sections 3603, 3604, 3605 and 3606 of this title may be enforced by civil action in appropriate United States district courts without regard to amount in controversy and in appropriate State or Local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . .

2. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111 (1959).

ASSUMING ARGUENDO THAT THE COURT OF APPEALS' ORDER IS A FINAL ORDER, THE DECISION BELOW NEITHER MISINTERPRETS NOR FAILS TO APPLY THE RULE OF THIS COURT AS FORMULATED IN UNITED AIRLINES, INC., v. EVANS, 431 U.S. 553 (1977) REGARDING 42 U.S.C. SECTION 2000e-5(e)

Petitioner argues that the Third Circuit held in the instant case that it was not bound by the holding of this Court in *United Airlines v. Evans*. In fact the circuit court distinguished the factual situation of *United Airlines v. Evans* from the instant situation. Petitioner argues that the fact that the Third Circuit accorded a different ruling to the facts of the instant case from that which this Court accorded the *Evans* facts is a limitation of the precedential value of *Evans* to situations involving terminations. The difference in treatment accorded this case by the Third Circuit is explainable by the fact that it found a continuing violation in the instant case. A review by this Court of the Third Circuit's determination would be a review of a narrow set of facts distinct and distinguishable from the facts in *Evans* and one not worthy of this Court's attention. The holding of the Court of Appeals in the instant case on its facts is not clearly inconsistent with the holding of this court in *United Airlines v. Evans* as evidenced from the Court of Appeals' distinguishing the instant case from its own holding in *Masco v. United Airlines* where on facts similar to the *Evans* facts the Third Circuit clearly following the ruling of this Court.

ASSUMING ARGUENDO THAT THE COURT OF APPEALS ORDER IS A FINAL ORDER, THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF THE APPROPRIATE STATUTE OF LIMITATIONS GOVERNING 42 U.S.C. SECTION 1981

The heading of petitioner's argument suggests that the decision of the Court of Appeals in the instant case with respect to the statute of limitations applicable to the 1981 claim is diametrically opposed to a decision of this Court on the same issue involving the same statute.

A reading of the cases of this Court cited by the petitioner as controlling indicates that those cases involved statutes of limitations governing personal injury claims arising out of two separate statutes. Neither of the cases cited deals with the issue of when the statute of limitations commences to run on a 1981 claim. Nothing in either of those cases justifies petitioner's assertion that the holding of the Court of Appeals in the instant case is inconsistent with those cases. Indeed, if anything, *Urie v. Thompson*, 337 U.S. 163 (1949) which is cited with approval in *United States v. Kubrick*, 48 U.S.L.W. 4030 (11-27-79), is supportive of the proposition that federal courts should carefully examine the particular facts of a case to make a determination as to when a statute of limitations starts to run, and clearly suggests that that time may vary based on the particular facts of the case. Although it was clear in *Urie v. Thompson*, that the medical condition for which plaintiff sought damages had long been in existence, the statute of limitations on his claim did not commence to run until such time as he was diagnosed as having the condition, which time was within the three-year statute of limitations.

To the extent that *United States v. Kubrick,* holds that a statute of limitations begins to run no later than when a person is aware of his injury and its probable cause, which in *United States v. Kubrick,* occurred when plaintiff's physician told him that the hearing loss which he had recently suffered was the result of medicine administered to him at a government hospital, and that advice was given plaintiff at a point outside of the statute of limitations, it is not inconsistent with the Third Circuit's holding on a radically different set of facts and circumstances that given the nature of the tenure process plaintiff knew his injury, the discharge and its probable cause. and filed this court complaint within the three-year statute of limitations which petitioner concedes to be controlling.

Further, the holding of *Bernard v. Gulf Oil Company,* 596 F.2d 1249 (5th Cir. 1979), cited by petitioner as evidence of a conflict between the circuits on the issue of applying the statute of limitations to a 1981 claim, is in fact consistent with the holding of the Third Circuit in the instant case on this issue. In *Bernard* the court held at p. 1255 that ". . . the relevant date for the purposes of the statute of limitations is the *last* date on which defendants improperly harmed plaintiff. . . ." Clearly, the Court of Appeals in the instant case found that date to be June 30, 1975. Any court complaint filed on this claim after June 30, 1978 would be untimely. As the instant court complaint was filed in September, 1977, it was filed within the time from which the statute of limitations, as defined by the court in *Bernard v. Gulf Oil Company,* commences to run.

ASSUMING ARGUENDO THAT THE COURT OF APPEALS ORDER IS A FINAL ORDER, THE DECISION OF THE COURT OF APPEALS TO REMAND THE ISSUE OF WHETHER RESPONDENT STATED A COGNIZABLE NATIONAL ORIGIN DISCRIMINATION CLAIM UNDER SECTION 1981 DOES NOT REQUIRE REVIEW BY THIS COURT.

The record is clear that the Court of Appeals refrained from affirming the dismissal of the 1981 claim on the alternative basis that the claim for national origin was improperly brought under 1981. Petitioner cites in support of its claim of error by the Court of Appeals in remanding for decision by the District Court, the case of *California Banker's Association v. Shultz*, 416 U.S. 21, 71 (1974). Though that case supports the proposition that alternative holdings may be made on appeal, it does not support a conclusion that error of a magnitude deserving this Court's attention occurred.

Petitioner has cited lower court decisions which have in fact held that 1981 does not protect a plaintiff from national origin discrimination. However, one of the cases cited, *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), recognizes national origin discrimination as redressable if it is raised to identify treatment different from that accorded white citizens. Additionally, cases not cited by petitioner, but cited to the Court of Appeals below by respondent have allowed plaintiffs to proceed where there appear to be allegations that the national origin claim is racially connected.[3]

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3. *Davis v. County of Los Angeles*, — F.2d —, 13 FEP Cases 1217 (9th Cir. 1976); *Miranda v. Clothing Workers, Local 208*, — F.Supp. —, 10 FEP Cases 557 (D. NJ 1974); *Maldonado v. Broadcast Plaza, Inc.*, — F.Supp. —, 10 FEP Cases 839 (D. Conn. 1974).

For this issue to merit the review by this Court there would at least have to appear to be a real conflict between circuit courts that have actually decided this issue. Cases cited by petitioner are, with one exception, district court cases disposing of the issue in a rather summary fashion and are not reviewable by this Court. Only one case, *Manzanares,* is a Court of Appeals case and the decision in that case actually contradicts petitioner's argument that 1981 does not protect alleged national origin discrimination.

Moreover, the instant case does not present a conflict between any earlier decision of this Court and that of the Court of Appeals below which decided to allow the District Court to decide this issue in the first instance. This Court should await the presentation of this issue in a more appropriate vehicle than the instant case, one where it is clear that the Court of Appeals' declining to decide the issue raises a conflict either with the decision of another circuit or with the decision of this Court.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Judith E. Harris
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Dated: January 11, 1980

Supreme Court, U. S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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JANUARY 23, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-939

DELAWARE STATE COLLEGE, et. al.,

Petitioners

v.

COLUMBUS B. RICKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY MEMORANDUM

RESTATEMENT OF THE CASE

The contractual employment relationship between Delware State College, a predominantly black educational institution located in Dover, Delaware, and the Respondent, Columbus B. Ricks, was composed of written one academic year contracts, i.e., each contract began in September of a school year and concluded in June of that same school year. Thus, Respondent was not employed from 1970 to 1975 continuously as represented in Respondent's Brief at p. 3.

When Respondent was denied tenure in March of 1974 by the Board of Trustees of Delaware State College, he was under contract for the term of September 1, 1973 through June 30, 1974. Thus, neither party had any contractual obligation to

the other Petitioner subsequent to June 30, 1974.

As a result of the Respondent being denied tenure, and in accordance with the College's established policies, Respondent was offered a "terminal year" contract which would run from September 1, 1974 through June 30, 1975. Respondent was under no legal obligation to accept or perform services for this contractual period. However, on September 3, 1974 he agreed to accept this "terminal year" contract. Respondent was permitted to fully perform this contractual agreement.

Further, there are no formal or informal procedures to reconsider tenure decisions other than those already identified in the Petition. Specifically, no such procedures exist during the "terminal year" contract period.

Moreover, there are no allegations that such formal or informal procedures for reconsideration of tenure decisions existed at Delaware State College and were discriminatorily denied to Respondent by Petitioners.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WARRANTS THIS COURT'S IMMEDIATE REVIEW

Respondent asserts that this Court has held that it can only review final orders of the Courts of Appeals, and he further asserts that this is the law in matters pertaining to such fundamental issues as the existence of the requisite jurisdiction of a Federal Court to determine a claim.* As evidenced

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*Respondent's Brief at pp. 4, 5.

by a long line of decisions by this Court, Respondent's contention is totally without merit.

In particular, the decision of this Court that is at the core of this Petition, United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) established clear recent precedent for this Court to grant certiorari in the present matter. The procedural history of Evans involved a dismissal of the complaint pursuant to Rule 12(b) in the District Court. The Court of Appeals reversed and remanded the matter for trial, and this Court granted certiorari to review the Court of Appeals decision to remand the matter. Procedurally, Evans is identical to the present matter.

In numerous cases, this Court has determined that where the petitions

involved fundamental questions affecting the further conduct of the case, it was most appropriate for this Court to grant certiorari to review the lower court decisions. Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945); Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964); and Land v. Dollar, 330 U.S. 731 (1947). Clearly, on the basis of the above authority, the fundamental issue pertaining to Respondent's compliance with the jurisdictional time limitations for asserting claims under 42 U.S.C. §§1981 and 2000e warrants this Court granting certiorari in this matter.

THE CONFLICT BETWEEN THE COURTS OF APPEALS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING A UNIFORM RULE.

Respondent asserts that the holding of the Ninth Circuit in Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) does not conflict with the holding of the Third Circuit in the present matter. Respondent supports the assertion by noting that both decisions involved remands to the trial courts. Such a claim fails to consider the actual holdings of the Courts, and attempts to obfuscate the direct conflict of the holdings. Respondent's contention is plainly a meritless attempt to assert form over substance which should be disregarded and rejected by this Court.

The Third Circuit specifically held that though the tenure denial was made on or before June of 1974, the 180 day period applicable to the Respondent's alleged unlawful employment practice did not begin

to run until the one year "terminal" contract expired on June 30, 1975, Petitioners' Appendix at pp. 5-A, 12-A, 13-A. The Ninth Circuit in Abramson specifically rejected the contention that the denial of tenure occurred at the time that the "terminal year" contract expired, see Abramson at page 209. Moreover, the Ninth Circuit required the Plaintiff to show some action regarding the tenure process that occurred within the requisite time period other than the expiration of the "terminal year" contract.

In Abramson, the Court remanded the case to the District Court for the purpose of determining whether that Plaintiff could substantiate her allegations that additional reconsideration procedures existed and were discriminatorily denied her at times that would bring such sub-

sequent acts within the application of Title VII. However, such a limited remand does not eliminate the conflict, since Respondent admits that there are no discriminatory actions alleged against any of the Petitioners in the present matter which occurred within 180 days of the date on which Respondent filed his complaint with the Equal Employment Opportunities Commission*, see Petitioners' Appendix page 28a. Thus, it is abundantly clear that the decisions of the Ninth and Third Circuits concerning the application of the requirements of 42 U.S.C. §2000e-5(e) as

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*Respondent filed his complaint with the Equal Emploment Opportunities Commission (EEOC) on April 4, 1975. No allegations of discriminatory acts occurring between October 7, 1974 and the filing date exist. The date relied upon by the Third Circuit was June 30, 1975, which was almost three months subsequent to the date of filing. No amendment to the initial filing was ever made by Respondent.

applied to tenure decisions are squarely in conflict with one another. Certainly, the application of the time limitation requirements of 42 U.S.C. §2000e-5(e) is an important question of federal law and a recurring matter that requires a uniform rule among the Circuit Courts.

Respondent asserts that the holdings of the Fifth Circuit in Bracamontes v. Amstar Corporation, 576 F.2d 61 (5th Cir. 1979) and the Eighth Circuit in Farris v. Board of Education of St. Louis, 576 F.2d 765 (8th Cir. 1978) are not in conflict with the holding in the present matter because a prior decision of the Third Circuit is consistent with their holdings, Masco v. United Airlines, 574 F.2d 1127 (3rd Cir. 1978). Such an assertion clearly misses the mark. The issue is not whether the Third Circuit has

decided other cases consistently with the other Courts of Appeals, but whether it has decided the present matter in a consistent manner with the holdings of the other Courts of Appeals. When this comparison is made, it is clear that the present holding conflicts with the decisions of the Fifth and Eighth Circuits, as noted above, and with the Fourth Circuit decision in Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978).

The holding in the present matter states that it is not bound by United Air Lines v. Evans, 431 U.S. 553 (1977) on the basis that Evans only applied to situations where there was an actual termination followed by some subsequent action. However, the other Circuits have applied the holding of Evans in situations that did not involve actual

terminations. In Farris, the Court applied the rule of Evans to a situation where there was no termination, but involved the claim of loss of seniority. In Bracamontes the Court was concerned with alleged discriminatory refusals to rehire the claimants. There were no allegations that the actual termination constituted the underlying discriminatory act for these charges. Additionally, in Friend, the Court applied the 180 day filing requirement to employees who were presently employed which is in clear conflict with the rationale offered by the Third Circuit in the present matter. The Fourth Circuit in Friend specifically relied upon the holding of Evans. For instance, promotional tests which were not made the basis of a complaint within 180 days of their occurrence were considered

time barred. Thus, this clearly conflicts with the Third Circuit's determination that Evans only applies to situations involving actual terminations.

Finally, Martin v. Georgia-Pacific Corp., 568 F.2d 58 (5th Cir. 1977) also held that United Air Lines v. Evans, supra., applied to employment discrimination other than termination situations. Respondent argues that Martin is distinguishable from the present matter because the facts in Martin indicated that there were no continuing discriminatory acts, and no acts which occurred within 180 days of the filing. As already noted, Respondent has conceded the same regarding the 180 days prior to his filing. Therefore, there is a direct conflict between the Third Circuit holding in this case and that of the Fifth Circuit in Martin.

Respondent maintains that prior Third Circuit decisions, Meyers v. Pennypack Woods Home and Ownership Association, 559 F.2d 1127 (3rd Cir. 1978) and Masco v. United Airlines, supra, which are or may be inconsistent with the present matter do not constitute a sufficient basis for this Court to review the present case. Clearly, in light of the conflict among the circuits, this additional intra-circuit conflict does constitute a significant ground for this Court to grant certiorari, Commissioner v. Estate of Bosch., 387 U.S. 456 (1967); John Hancock Ins. Co. v. Bartels, 308 U.S. 180 (1939); Dickinson v. Petroleum Corp., 338 U.S. 507 (1950).

Respondent further maintains that this Court should not grant certiorari in this matter because the Second Circuit has

decided two cases in a similar fashion to the present matter, Egelston v. State College at Genesco, 535 F.2d 752 (2nd Cir. 1976) and Noble v. University of Rochester, 535 F.2d 756 (2nd Cir. 1976). Clearly, these cases simply exasperate the already existing conflict between the Circuits. For instance, the Ninth Circuit in Abramson v. University of Hawaii, supra, specifically refused to follow the rationale of Egelston. Of even greater significance, however, is the fact that both of these cases were decided prior to this Court's decision in United Air Lines v. Evans, supra. Subsequent to this Court's decision in Evans, the Second Circuit narrowly construed and refused to apply either of these cases, where the application of 42 U.S.C. §2000e-5(e) was at issue, Smith v. American President Lines, Ltd., 571 F.2d 102, 105 (1978).

THE COURT OF APPEALS DECISION IN THIS MATTER CLEARLY FAILS TO APPLY THE RULE OF UNITED AIR LINES, INC. V. EVANS.

Respondent maintains that the Third Circuit was not bound by this Court's ruling in United Air Lines v. Evans, supra., because the Third Circuit found "a continuing violation" in the present matter. This finding totally disregards the holding of this Court in Evans. It is precisely the resurrection of the discredited "continuing violation" concept that places the present case at odds with Evans. Clearly, such a conflict warrants this Court granting certiorari to review this matter. In fact, on this basis alone, Petitioners believe summary reversal of the Third Circuit is appropriate.

Recent precedent concerning Court of Appeal conflicts with holdings of this

Court, also clearly supports the granting of certiorari, Henderson v. Kibbe, 431 U.S. 145 (1977).

THE HOLDING OF THE THIRD CIRCUIT, CONCERNING WHEN A CAUSE OF ACTION ACCRUES FOR PURPOSES OF ASSERTING A 42 U.S.C. §1981 ACTION, CLEARLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS AND WITH OTHER COURTS OF APPEALS DECISIONS.

Neither the Third Circuit nor the Respondent has offered any legal basis for determining that a denial of tenure which was complete and made known to the Respondent not later than June of 1974 should be treated as not accruing until the Respondent fully performed his last employment contract with the Petitioner College. It should be noted that there are no allegations claiming the procedures for offering terminal year contracts to persons not receiving tenure status were applied in a discriminatory manner to

Respondent. Moreover, the terminal year of contractual relationship was fully performed by both parties. There are no discriminatory allegations concerning the performance of this contract. Thus, on the basis of the above facts, the injury or harm complained of occurred when the Respondent was denied tenure. When Respondent was aware of this denial, he had a right, at that time, to seek legal redress for that decision.

The Fifth Circuit held in Bernard v. Gulf Oil Company, 596 F.2d 1249 (Fifth Circuit 1979), that the statute of limitations began to run on the last date when a party is improperly harmed. The Court further held that the statute applies to new actions when new and distinct activities are alleged. However, as already indicated, in the present case

there are no new and distinct actions alleged to be discriminatory beyond the time that tenure was denied Respondent. Thus, the Third Circuit's holding is in direct conflict with the Fifth Circuit's holding in Bernard.

Additionally, this Court's holding in United States v. Kuberick, 48 U.S.L.W. 4030 (11-27-79) involved a situation applying the most liberal standards for determining when a cause of action accrues. This Court held that a cause of action accrues when the injury occurs and certainly not later then when the injured person is aware of its probable cause. Clearly, as of June 1974, Respondent was aware of the denial of tenure. Thus, to allow any other subsequent time to constitute the time when this cause of action accrued is to disregard this

Court's holding in Kuberick and is in direct conflict with it. On the basis of these clear conflicts, Petitioners suggest that summary reversal of the decision of the Third Circuit in this matter is warranted.

DETERMINING WHETHER A CLAIM FOR ALLEGED NATIONAL ORIGIN DISCRIMINATION IS ACTIONABLE UNDER 42 U.S.C. §1981 CONCERNS THE RESOLUTION OF AN IMPORTANT FEDERAL QUESTION OF A RECURRING NATURE.

At no time from the initiation of Respondent's EEOC complaint through the filing of the complaint in this case, has Respondent made any allegations of racial discrimination. All of the facts alleged by Respondent have been designated and described as allegedly based upon national origin discrimination, see Petitioners' Appendix page 36a, n.10. Thus, only a national origin discrimination claim is

involved here. Hence, an accurate interpretation of Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979), leads inescapably to the conclusion that 42 U.S.C. §1981 affords a remedy only for racial discrimination, and does not afford this Respondent any relief.

Acceptance of the Respondent's contentions concerning Manzanares, however, would create a direct conflict in the Circuits concerning this issue. The District of Columbia Circuit has held that the statute does not afford relief for allegations of national origin discrimination, Kurlyas v. U.S. Department of Agriculture, 514 F.2d 894 (D.C. Cir. 1975) while Respondent maintains that Manzanares concludes that it does. It is quite clear that this conflict needs to be settled and determined by this Court.

CONCLUSION

For these reasons and those cited in the Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully Submitted,

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IN THE

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OCTOBER TERM, 1979

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BRIEF FOR THE PETITIONERS

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PLAINTIFF'S CLAIM FOR DENIAL OF TENURE STATUS WAS NOT TIMELY ASSERTED AGAINST THE DEFENDANTS UNDER 42 U.S.C §1981, AND IS, THEREFORE, BARRED BY THE APPLICABLE STATUTE LIMITATIONS. 49

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. pp. 1a-18a) is reported at 605

F.2d 710 (3rd Cir. 1979). The opinions of the District Court (Pet. App. pp. 20a-52a) are not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. pp. 18a-20a) was entered on September 18, 1979. The Petition for a Writ of Certiorari was filed on December 17, 1979, and was granted on February 19, 1980 (A. 102-103). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Plaintiff has complied with the time requirements of 42 U.S.C. §2000e-5(e) in this matter, when all actions complained of occurred prior to the 180 days

immediately preceding the filing of his alleged discrimination claim with the Equal Employment Opportunity Commission on the basis that the Plaintiff continued to be affected by these actions up through the date that his employment relationship expired with the Defendants.

2. Whether a cause of action under 42 U.S.C. §1981 accrued for the purposes of applying the pertinent statute of limitations at the time that these alleged discriminatory acts were performed and Plaintiff had notice of the same or was Plaintiff entitled to forego seeking relief for these alleged discriminatory actions until his employment relationship with the Defendants ceased to exist?

STATEMENT

Respondent, Columbus B. Ricks, a black male Liberian filed an action against the Petitioners, Delaware State College and the individuals who are or were employees and officials of the College, claiming employment discrimination on the basis of national origin. Ricks filed this action in the United States District Court for the District of Delaware on September 9, 1977. Ricks invoked the jurisdiction of the District Court on the basis of 42 U.S.C. §2000e et seq., and 28 U.S.C. §§1331 and 1343(3) and (4).

Ricks began his employment relationship with Delaware State College, a predominantly black educational institution located in Dover, Delaware, during September of 1970 (A. p. 33). From that

time through June 30, 1975, Ricks entered into a series of one academic year contracts with Delaware State College. All of these contractual periods of employment were fully performed by Ricks (A. p. 91).

In February, 1973, Ricks was considered for tenure and denied the same at that time by the Committee on Promotions and Tenure of the faculty of Delaware State College. However, he was offered another one academic year contract and would be reconsidered for tenure status during the following year (A. p. 16). Thereafter, in February of 1974, the College's Committee on Promotions and Tenure reviewed Ricks' status again and again recommended that he be refused tenure (A. p. 20). It was further recommended that, as a result of the tenure denial and in accordance with

established school policy, Ricks would be offered a terminal academic year contract of employment.

On or about March 13, 1974, the Board of Trustees of Delaware State College met and accepted the Committee's recommendations. (Pet. App. p. 3a). Thereafter, Ricks filed a grievance in April of 1974 with the Educational Policy Committee (A. pp. 49-52). A hearing on the Ricks matter was conducted by this Committee in May of 1974. The Educational Policy Committee determined that Ricks' grievance should be denied and that the decision to deny Ricks tenure should remain unchanged. The decision of the Educational Policy Committee was accepted by the Board of Trustees and conveyed to Plaintiff Ricks by letter of September 12, 1974 (A. p. 21). The denial of Ricks' grievance by the Educational Policy Committee has not

been alleged to have been a discriminatory decision, nor has it been alleged that any actions by this Committee or its members, acting as such, regarding its decision were done in any discriminatory manner.

As a result of Ricks being denied tenure status, the Board of Trustees in June of 1974 notified him, in accordance with the policies of Delaware State College, regarding teaching employees not granted tenure, that the College would offer Ricks a terminal year contract for the academic year September 1, 1974, through June 30, 1975. Ricks accepted this terminal year contract and the same was performed in full. On April 4, 1975, Ricks filed a charge of employment discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC). On June 30, 1975, Ricks terminal year contract with Delaware State College expired.

The District Court dismissed all of the counts of the Complaint filed by Ricks on the basis that the same were untimely. (Pet. App. pp. 20a-44a). From that decision of August 30, 1978, Ricks sought reconsideration by the District Court, which was denied on October 16, 1978. (Pet. App. pp. 45a-52a).

Though the District Court judgments dismissed the Plaintiff's entire complaint, Counts I through VI inclusive, Plaintiff only appealed his claims under 42 U.S.C. §§1981 and 2000(e). The Court of Appeals held that for purposes of determining when Plaintiff's cause of action accrued for his alleged unlawful denial of tenure the date of June 30, 1975, when his terminal year contract expired would be utilized, rather than the time when the decision to deny Plaintiff

tenure status was made and conveyed to him, June 26, 1974. Further, the Court of Appeals determined that the actions of the Defendants in denying Plaintiff tenure constituted a "continuing discriminatory act" for which the Plaintiff could file a complaint with the EEOC at least as early as April, 1975, and as late as 180 days subsequent to June 30, 1975, in order to meet the time requirements of 42 U.S.C. §2000e-5(e).

Concerning Plaintiff's 42 U.S.C. §1981 claim, the Court of Appeals held for purposes of filing a timely action challenging the denial of tenure decision, Plaintiff need only file a complaint within three years from June 30, 1975. The Court of Appeals offered no explanation for this determination other than to rely upon the reasoning it offered

for finding the Plaintiff's 42 U.S.C. §2000e (hereinafter referred to as Title VII) claim to have been timely filed.

STATUTES INVOLVED

(1) 86 Stat. 105, (1972) Title 42 U.S.C. §2000e-5(e), Page 1241 (1976 Ed.). Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local authority.

> A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charges made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person within 300 days after the alleged unlawful employment practice occurred, or

> within 30 days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) 16 Stat. 144 (1871), Title 42 §1981, Page 1216 (1976 Ed.). Equal rights under the law.

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SUMMARY OF ARGUMENT

I. Defendants denied Plaintiff tenure status at Delaware State College not later than June 26, 1974. At this time Defendant was also notifed that he would be offered a terminal year contract

to run from September 1, 1974, through June 30, 1975, which Plaintiff was free to accept or reject in accordance with the established college policies pertaining to teaching employees who had been denied tenure status. As such, these decisions and actions of the Defendants come with the parameters of "employment practices" as defined in 42 U.S.C. §2000e-2(a)(1). As such practices, an alleged aggrieved employee is required to file a complaint against the employer within 180 days of the occurrence of any alleged unlawful employment practice pursuant to 42 U.S.C. §2000e-5(e). The rule of United Air Lines v. Evans, 431 U.S. 553 (1977) holds that the failure of a Plaintiff to file such a claim challenging these discrete, distinguishable, and identifiable employment occurrences, within the time period provided, bars the employee from

asserting them at a later date under the pretext of a "continuing violation." The rule of Evans specifies that the failure of an employee to file a timely complaint allows the employer to treat the alleged discriminatory action as if it were lawful, and said acts have no greater legal consequence than an alleged discriminatory act committed prior to the enactment of Title VII.

The rule of Evans also established the legal principal that a discriminatory act does not constitute a "continuing violation", for the purposes of determining when a timely complaint must be filed with the EEOC, simply because the effect or impact of such an alleged discriminatory act continues beyond the date upon which the act occurred. Rather, it must be determined whether a present act

or violation exists within the immediate 180 days prior to the date of filing a complaint under Title VII.

The Plaintiff in this matter filed a complaint with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) on April 4, 1975. Plaintiff can cite no violations or actions committed by the Defendants that occurred within 180 days prior to this filing pertaining to his denial of tenure by the Board of Trustees of Delaware State College. The only date relied upon by the Plaintiff for this filing is that of June 30, 1975, the date at which his terminal year contract expired. (A. p. 99). The decision to deny Plaintiff tenure in June of 1974 certainly had an effect and impact upon the Plaintiff thereafter. However, Plaintiff can point to no actions taken by the Defendants that

would allow his filing to be considered timely. Thus, the decisions to deny him tenure and offer him a terminal year contract for purposes of a Title VII action can be treated by the Defendants as lawful and have no greater legal effect than acts that occurred prior to the enactment of this statute.

The Court of Appeals for the Third Circuit in reversing the District Court's decision which found the Plaintiff's Title VII action to be untimely, held that the denial of tenure constituted a continuing violation which could ripen for a complaint at any time up to 180 days subsequent to the expiration of the terminal year contract. The Court of Appeals determined that it was permitted to utilize this "continuing violation" concept despite the holding by this Court

in Evans on the basis that Evans should only apply to situations where a termination has already occurred, and the employee is attempting to utilize that termination in a subsequent claim for relief. Thus, the Court of Appeals reasoned that since a termination had not occurred at the time that Plaintiff was denied tenure, he would be free to file a claim for this denial up to 180 days subsequent to his termination.

This determination by the Court of Appeals espouses a policy entitling an employee, at the time of his termination or expiration of employment, to file within 180 days thereof a complaint citing any type of employment occurrence that transpired during his term of employment as a basis for a timely Title VII complaint. Such a policy is directly contrary to the holding in United Air Lines v. Evans and the language and policy

requirements of Title VII. Under the Court of Appeals determination, the 180-day time requirement would have no application to occurrences that arose during the employment relationship, but rather would only apply to those occurrences when that relationship ends. Thus, the language of 42 U.S.C. §2000e-2(a)(1) becomes meaningless as to matters other than terminations. Moreover, stale claims which may be impossible for Defendant employers to explain or defend can now serve as the basis for a valid Title VII action under the Third Circuit policy.

The policy of allowing employment practices that occurred during the term of employment to ripen for purposes of filing a Title VII complaint within 180 days of termination has not been followed by other Courts of Appeals. These Courts have held

that employment practices occurring during the term of employment must be filed within 180 days of there occurrence or they shall be barred, Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980); Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Martin v. Georgia-Pacific Corp., 568 F.2d 58 (5th Cir. 1977); Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) (this case dealt with a timely filing relative to the enactment date of Title VII).*

*The Court of Appeals relied upon two Second Circuit cases decided prior to United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); Egelston v. State University College at Genesco, 535 F.2d 752 (2d Cir. 1976) and Noble v. University of Rochester, 535 F.2d 756 (2d Cir. 1976). The latter cases is irrelevant to a tenure situation and the former concerned an alleged policy of sex discrimination in salaries. Moreover, their limited precedential value was noted by the Second Circuit in Smith v. American President Lines, Ltd., 571 F.2d 102 (2d Cir. 1978).

II. Plaintiff claims that Delaware State College discriminated against him in denying him tenure status on the basis of his national origin. In determining the applicable statute of limitations for this claim pursuant to the dictates of Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the District Court determined that the general three year statute of limitations found in 10 Del. C. §8106 would be applicable to these claims. Since the complaint was filed on September 9, 1977, Plaintiff would be barred from recovering upon any causes of action that accrued prior to September 9, 1974. The determination to deny Plaintiff tenure and award him a terminal year contract was made not later than June 26, 1974. Thus, if these decisions are alleged to have been discriminatory, an action seeking relief from the same of

necessity had to be filed on or before June 26, 1977. This Plaintiff failed to file such suit and, therefore, claims arising out of this denial of tenure and offer of a terminal year contract are barred by the applicable three year statute of limitations.

A complaint brought under §1981 needs to allege that the Plaintiff's employment was unlawfully and discriminatorily denied him by the Defendants. Plaintiff relies upon the date that his terminal year contract expired as time when these discriminatory acts accrued. However, Plaintiff has not alleged any discriminatory actions pertaining to the offer, acceptance, terms, and performance of his employment contract which expired on June 30, 1975. Thus, this date adds nothing to the Plaintiff's discrimination complaints pertaining to tenure.

On the basis of the rule noted in United States v. Kubrick, __ U.S. __ 62L Ed 2d 259 (1979) a person must file his claim against the Defendant not later than the time that he is aware of the alleged injury caused by the Defendant. In the present matter, Plaintiff clearly understood and was aware of the Defendants' actions to deny him tenure and to offer him a terminal year contract not later than June 26, 1974. Plaintiff has offered no other subsequent discriminatory acts from which to base his claim for employment discrimination under §1981, and, therefore, this claim is barred by the applicable three year statute of limitations.

Moreover, Plaintiff has failed to comply with the applicable statute of limitations, as noted in Urie v. Thompson,

337 U.S. 163 (1949). There this Court stated that the purpose of a statute of limitations is to require one to take action within a specific period of time after a party has received notice of the invasion of his legal rights. Clearly, Plaintiff had more than sufficient notice of this alleged invasion of his rights on or before June 26, 1974. Consequently, Plaintiff is not entitled to sleep upon these rights and attempt to assert them on the basis of an unrelated and inconsequential date approximately one year thereafter.

ARGUMENT

I. PLAINTIFF FAILED TO COMPLY WITH THE TIME LIMITATION REQUIREMENTS OF 42 U.S.C. §2000e-5(e) WHEN HE FAILED TO FILE A CHARGE OF DISCRIMINATION WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION WITHIN 180 DAYS OF THE DAY UPON WHICH HE WAS DENIED TENURE STATUS BY DELAWARE STATE COLLEGE SINCE

SUCH A DECISION DOES NOT CONSTITUTE A "CONTINUING VIOLATION" RELIEVING ONE OF COMPLYING WITH THE REQUIREMENTS OF 42 U.S.C. §2000e-5(e).

Plaintiff's charge of discrimination was filed with the EEOC on April 4, 1975. As indicated by the complaint, Plaintiff's basic allegation relates to the Defendants' decision to deny him tenure status on the faculty of Delaware State College.

In light of the determination to deny Plaintiff tenure and in accordance with the established policies of Delaware State College, the Plaintiff was notified on or about June 26, 1974, that though Plaintiff would not receive tenure status with Delaware State College, he would be offered the appropriate terminal year contract which would take effect from September 1, 1974, through June 30, 1975.

Plaintiff could point to no allegations concerning the actions of the Board of Trustees occurring on or after October 7, 1974, up to the date of Plaintiff's filing with the EEOC. Rather, the only alleged act asserted by Plaintiff subsequent to October 7, 1974, is the date when Plaintiff's last contract with Delaware State College expired by its own terms, i.e. June 30, 1975. It is on the basis of this date, that Plaintiff asserts his claim to have been timely filed.

This Court's recent decision in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) clearly supports the determination made by the District Court in this matter. In Evans, this Court was asked to determine whether violations of Title VII existed where an employer was refusing to credit an employee with seniority for her prior service which had

been allegedly terminated on a discriminatory basis. No violation was found to exist in Evans, though the present seniority system continued to have an adverse impact on the terms and conditions of that Plaintiff's employment. However, it was noted that the employer was entitled to treat past acts of discrimination as lawful after the employee failed to file a timely charge of discrimination regarding the same. Moreover, it was determined that

> "A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." United Air Lines, Inc. v. Evans at p. 558.

In light of the holding in United Air Lines v. Evans, it is encumbant upon the Plaintiff to identify some present violation that existed within 180 days of

the date upon which he filed his complaint with the EEOC. As noted by the District Court (Pet. App. p. 28a), the date upon which such a present violation must have occurred on or thereafter was October 7, 1974. However, as admitted by Plaintiff, there are no acts of the Board of Trustees which occurred subsequent to October 7, 1974, which would constitute a present violation pertaining to the denial of tenure up to the date of the Plaintiff's filing. Therefore, the actions of the Defendants which were not made a part of a timely filing are entitled to be treated as lawful actions or actions which occurred prior to the enactment of Title VII. Thus, the decision to deny Plaintiff tenure and to offer him a terminal year contract cannot now be treated as unlawful discriminatory actions.

In an attempt to avoid the consequences of his failure to file a timely charge of discrimination concerning the denial of tenure status, Plaintiff maintained that the alleged discriminatory denial of tenure did not accrue for the purposes of filing a claim under Title VII until his employment ceased (A. p. 99). The only rationale offered by Plaintiff for his position is that the Board of Trustees still had the power to reverse its decision and grant tenure until June 30, 1975 (Pet. App. p. 30a). The District Court rejected this contension, noting that such hypotheticals cannot serve as the basis for reviving a stale claim (Pet. App. pp. 30a, 31a).

In light of the holding of this Court in United Air Lines, Inc. v. Evans, the District Court determined that the expiration date on the terminal year

contract added nothing to the Plaintiff's claim concerning the Defendants' denying him tenure status. For example, in light of the Plaintiff's failure to timely challenge the Defendant's decisions concerning tenure and the offering of a terminal year contract, the Defendants are entitled to treat those decisions as lawful acts or acts concluded prior to the enactment of Title VII. Therefore, when the employment contract expired by its own terms in June of 1975, Plaintiff had no greater rights than any other teacher who had been denied tenure and permitted to perform his terminal year contract. Since the performance of this contract, in light of a denial of tenure, has not been challenged by the Plaintiff as a discriminatory practice utilized against Plaintiff but not other persons who were

denied tenure, this practice is neutral on its face. Thus, completion of this neutral practice creates no new claims for relief under Title VII. A similar result was reached by this Court in United Air Lines, Inc. v. Evans at page 559, n. 13, where it was noted that:

> At the time she was rehired in 1972, Respondent had no greater right to a job than any other applicant for employment with United. Since she was in fact treated like any other applicant when she was rehired, the employer did not violate Title VII in 1972. And if the employer did not violate Title VII in 1972 by refusing to credit Respondent with back seniority, its continued adherence to that policy cannot be illegal.

In addition to the expiration of the employment contract on its own terms being insufficient to create any new rights in the Plaintiff for a Title VII claim,

Plaintiff has failed to offer any logical basis for holding that the statute of limitations for the denial of tenure should accrue in June of 1975, rather than at the time that those decisions were made and communicated to the Plaintiff. As already noted (Pet. R. Br. p. 2), Plaintiff's contract at the time that the Board advised him of the denial of tenure and offered him a final year contract, was under contract with Defendants only through June 30, 1974. Thus, it was the Plaintiff's decision to accept the "terminal year" contract that extended his employment relationship through June 30, 1975. Had Plaintiff not accepted this contract, Plaintiff would have no basis for attempting to evade the applicable timely filing requirements of Title VII.

Thus, Plaintiff seeks to extend the running of the statute of limitations against him by accepting an additional year's employment.

The Court of Appeals for the Ninth Circuit dealt with an almost identical situation in the case of Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979). In Abramson, the Ninth Circuit dealt with a denial of tenure claim that was factually very similar to the present matter. Here, the plaintiff was employed on four one-year contracts. Tenure considerations were made by the appropriate faculty and administrative personnel during the 1970-1971 school year. In June of 1971, Abramson was informed that she would not receive tenure and was offered a "terminal year" contract of employment for the 1971-1972 academic year which she accepted. Shortly after

this terminal year contract expired in June of 1972, Abramson filed a charge with the EEOC claiming that she was denied tenure status on the basis of her sex which was unlawful and discriminatory.

In the case, the plaintiff had to show some discriminatory action taken by the University after March 23, 1972 to have a valid timely claim. Specifically, the Court of Appeals noted that if the denial of tenure was final prior to March 24, 1972, and no other discriminatory acts occurred subsequent to that date, then the employee's complaint would be invalid.

In attempting to provide the Court of Appeals with an event that occurred subsequent to March 24, 1972, the employee maintained that the expiration date of the terminal year contract could be used as

the discriminatory occurrence subsequent to March 24, 1972, upon which to base her denial of tenure claim.

The Court of Appeals specifically rejected that claim and noted the following:

> "In this case, Appellant was employed under a series of one-year contracts, none of which at the time of the June, 1971, decision extended Appellant's employment to or beyond March 24, 1972. Nevertheless, the University was obligated upon the June, 1971, decision to offer her a terminal year. It could be argued, therefore, that inasmuch as the consequences of the tenure denial extended at least until the expiration of the terminal year, Appellant has a Title VII cause of action. We believe, however, that the Pennsylvania district courts misdirected their attention. The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful. Liability of the Appellees must be premised on discriminatory action taken by them on or after March 24, 1972,

> if the tenure decision was final prior to that date, and no other discriminatory action took place thereafter, Appellant's action was properly dismissed." Abramson v. University of Hawaii, 594 F.2d 202 at 209.

Thus, the Court of Appeals for the Ninth Circuit agreed with the District Court in the present matter that the proper focus is upon the time that the allegedly discriminatory act occurred, and not upon the times when the consequences, impact, or effects of such actions are noticed. The decisions of these two Courts is consistent and in accord with the holding of this Court in United Air Lines v. Evans, 431 U.S. 553, 558.

In reviewing and deciding the present matter, the Court of Appeals for the Third Circuit determined that the 180-day period for filing a charge of discriminatory denial of tenure did not begin to run

until the terminal year contract expired on June 30, 1975. This date was determined by the Court of Appeals to be the beginning date for the running of the time requirements of Title VII despite the fact that the complaint under Title VII was filed approximately three months prior to that date, April 4, 1975. The Court of Appeals supports its determination as to the operative date for filing a discrimination claim in this matter by noting that in some instances decisions have been reconsidered and sometimes reversed in employment situations. (Pet. App. pp. 9a-10a). However, while noting that decisions may be reversed, the Court of Appeals failed to identify any unexhausted internal procedures for such a review that the Plaintiff utilized or could have utilized on or after October 7, 1974. In fact, there were no such procedures in

existence nor does Plaintiff allege or maintain that any existed. Therefore, mere speculation as to the possible reversal of the tenure decision, in the total absence of any basis for the same, should not be the foundation for disregarding the filing requirements of Title VII. In fact, even when such refusals have been made, it has been held that the same do not "breath life into stale claims," Meyers v. Penny Pack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977).*

The Court of Appeals also reasoned that it would be unfair to require

*Such informal requests and refusals were found to be insufficient by this Court to resurrect old claims. United Air Lines, Inc. v. Evans, at 556.

employees to file discrimination charges during their terms of employment, since such filings would require the employee to determine when a decision is final and employees may lose their opportunity to file a charge if they proceed with internal resolution of their grievances (Pet. App. p. 12a).** As already noted, all internal procedures for resolving this matter had been concluded more than 180 days from the time that Plaintiff filed his complaint with the EEOC. Moreover, a decision to deny one tenure status is a clear, identifiable, discrete act which any lay person can surely understand and act upon when notified of the same. It is no different or any more complex than a

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*This rationale for relieving an employer of his obligation to pursue his Title VII remedies was rejected by this Court, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 236 (1976)

transfer, promotion, or other employment determination that requires one to act within 180 days of its occurrence in order to comply with the filing requirements of Title VII, see 42 U.S.C. §2000e-2(a) for definition of unlawful employment practices.

Though the Court of Appeals for the Third Circuit held that the 180-day period for filing a claim concerning alleged discriminatory denial of tenure runs from the date of the expiration of the terminal year contract, the Court nevertheless held that the filing of a charge approximately three months before that date was timely because his claim had matured by that time (Pet. App. pp. 13a, 14a). This determination is based, in part, upon the Court classifying the denial of tenure decisions to be "continuing violations" at least

from the time that they occurred through the date that the terminal year contract expired.

Admittedly, the decision to deny tenure has an effect and impact upon the Plaintiff after it has been rendered, as do most employment decisions. However, as this Court noted in United Air Lines v. Evans, 431 U.S. 553, 558, the critical question is not whether the actions of an employer have a continuing impact or effect upon the employee, but rather whether there is any present violation in existence within the time requirements for filing a complaint with the EEOC. It is quite clear that no present violation existed on June 30, 1975, and neither the Plaintiff nor the Court of Appeals offer any factual basis for finding that the procedure for denying Plaintiff tenure occurred at any time on or after

October 7, 1974. Thus, the acts occurred and were known to the Plaintiff at a time when he should have filed a complaint with the EEOC and failed to do so.

The time requirements of Title VII as established by the Congress, are short and require an employee to act promptly and not sit on his rights. Yet, under the rationale offered by the Court of Appeals, this employee would be entitled to wait more than a year after his employer had determined to deny him tenure before the time limitations even began to run. Clearly, this approach frustrates the very purpose and policy of the time requirements found in Title VII. Acceptance of this revived "continuing violation" doctrine would result in numerous stale claims asserted against employers well beyond the appropriate time for action as required by the statutory mandate of Title

VII. The approach taken by the Court of Appeals adopts a policy of allowing all stale employment practices to ripen for litigation at the time of termination. Acceptance of this would emasculate the purpose and intent of 42 U.S.C. §2000e-5(e).

The impact of a determination to deny one tenure status clearly can be claimed to effect the employee for many years in the future. Since tenure status gives a person an indefinite employment position for the rest of his working days, a decision not to grant one such a position not only affects the employee adversely one year subsequent to the decision but adversely affects the employee each year thereafter. Thus, if impact, were the basis for determining when a timely filing must be made, the time requirements of

Title VII would never run on a tenure decision until the employee has retired from the work force. However, it is clear that impact is not the determining criteria for when a claim under Title VII must be filed. Rather, as statutory language clearly states, it is to be "within 180 days after the alleged unlawful employment practice occurred," 42 U.S.C. §2000e-5(e). Since a denial of tenure is clearly an employment practice as defined by 42 §2000e-2(a), Plaintiff was required to file a complaint concerning this decision not later than 180 days subsequent to its occurrence. By not filing until April 4, 1975, the Plaintiff failed to make a timely filing, and Defendants were entitled to treat their decision denying Plaintiff tenure as a lawful one having no adverse legal consequences.

The Court of Appeals for the Third Circuit noted that United Air Lines, Inc. v. Evans, 431 U.S. 553, had no application to the present matter since the Evans ruling only applied to situations where an actual termination occurred with the employee attempting to obtain relief subsequent to that termination on a claim that subsequent effects from the termination amount to a "continuing violation." Admittedly, this Court's decision in Evans 431 U.S. 553, did involve a termination. However, neither the language and rationale of Evans, nor the applicable statutes, nor the decisions of other Courts of Appeal support this narrow application of the Evans decision. The recent case of Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980) amply illustrates the refusal of other Courts of

Appeal to limit the rule of Evans to termination situations. In this case, the Court of Appeals for the Fifth Circuit reviewed an employee's claims that he was denied promotions and transfers during his term of employment. The Plaintiff also alleged that the employer used a discriminatory testing system concerning these alleged unlawful employment practices. In Gonzales, the Court noted at page 249 that:

> "A past act of discrimination for which a party did not file a charge of discrimination with the EEOC within the limitations period is legally equivalent to a discriminatory act that occurred before the enactment of Title VII. Although such a past discriminatory act may continue to effect an employee's present pay and fringe benefits, such an effect does not constitute a continuing violation of Title VII."

The Court further noted that when an employer is charged with having engaged in discriminatory conduct which involves discrete acts of the employer and said acts occur more than 180 days prior to the filing of a charge with the EEOC, then as to those discrete acts, no complaint can be heard as the same is untimely despite the fact that it may still adversely affect the employee. The Court also noted that a failure to promote an employee, if said failure occurred more than 180 days prior to the filing of the employee's charge, then such an action cannot form the basis of a timely Title VII complaint. The Court further determined that a failure to promote does not constitute a continuing violation. This reasoning is most consist with the policy set out by this Court in Evans. Applying it to the present matter, this policy would deter-

mine that a denial of tenure, though it continues to affect an employee, does not amount to a continuing violation for the purposes of evading the filing requirements of filing Title VII.

Additional support and reasoning for this position is found in Hodge v. McLean Trucking Co., 607 F.2d 1118 (5th Cir. 1979). In this case, the Court was concerned with an allegation of discrimination pertaining to a refusal to hire a particular employee. The employee maintained that this refusal to hire presently affected his current rights under an existing racially neutral seniority system. The Court noted that a claim based on these past acts of discrimination cannot now be brought on the basis that the same continue to

adversely affect the employee. Yet, in contrast to this holding, this is precisely what the Court of Appeals is attempting to assert here.

Under the policies of the College, a person denied tenure status is offered a terminal year contract. This policy applies both to Plaintiff and to any other person similarly situated. The running of this terminal year contract is nothing more than a neutral policy of the College. No where did the present Plaintiff allege or the Court of Appeals hold that as an employee denied tenure he was entitled to anything more than the offering of this terminal year contract. Thus, the performance of this contract is neutral and does not raise any additional discriminatory acts beyond the act of denying the Plaintiff tenure which occurred in June of 1974.

Additional support for the position that the rationale and application of the United Air Lines, Inc. v. Evans policy applies to employment occurrences that arise during the course of one's employment are found in Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (which dealt with allegations of an employee that promotions and tests for promotions which occurred more than 180 days before the filing of a discrimination charge with the EEOC were barred); Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978) (employee claims of being denied full seniority rights due to earlier maternity leave held to be untimely asserted); Martin v. Georgia-Pacific Corp., 568 F.2d 58 (5th Cir. 1977) (employee charged employer with discriminatory seniority practices but failed

to file a timely charge for this alleged discrimination and Court held it barred by 42 U.S.C. §2000e-5(e)).

On the basis of the above cited authority, Defendants maintain that the decisions of Delaware State College to deny Plaintiff tenure status occurred more than 180 days from the time that he filed his complaint with the EEOC. Thus, Plaintiff is barred from pursuing his discrimination claim on this basis and cannot attempt to revive the same by alleging that the effects of this decision transform these employment occurrences into a continuing violation at least through the expiration date of his final year contract with Delaware State College.

II. PLAINTIFF'S CLAIM FOR DENIAL OF TENURE STATUS WAS NOT TIMELY ASSERTED AGAINST THE DEFENDANTS UNDER 42 U.S.C. §1981, AND IS, THEREFORE, BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

As in his Title VII claim, Plaintiff appealed to the Court of Appeals after the District Court dismissed his claim under 42 U.S.C. §1981 on the basis of it being barred by the applicable statute of limitations. Concerning this claim, the District Court determined that a cause of action for Plaintiff's denial of tenure status accrued not later than June 26, 1974, when the Board notified him of its determination to deny him tenure and offer him a terminal year contract. On appeal to the Third Circuit, Plaintiff maintained that the District Court erred by failing to use the expiration date of the terminal year contract, June 30, 1975, for purposes of applying the applicable statute of limitations for a §1981 action (A. p. 100-102).

Since 42 U.S.C. §1981 does not contain its own designated federal statute of limitations, this statute utilizes the most analogous state statute available in the forum where the suit is filed, Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The District Court in Delaware has held that the most analogous state statute for purposes of a §1981 claim is that found in 10 Del. C. §8106, the general three year statute of limitations. The application of this statute to the present matter is not disputed by the parties.

Plaintiff's complaint was filed on September 9, 1977. Thus, Plaintiff is barred from recovering upon any claims arising out of allegedly discriminatory acts occurring prior to September 9, 1974. This was the rule utilized by the District

Court in this matter (Pet. App. p. 35a). In both the District Court and the Court of Appeals, the Plaintiff maintained that his cause of action did not accrue until the terminal year contract expired. However, the District Court noted that for purposes of applying the applicable statute of limitations, a cause of action accrues at the time that the Plaintiff could have sued the Defendants for allegedly denying him tenure status on a discriminatory basis. The Court further noted that the statute of limitations begins to run when the cause of action has accrued.

This analysis by the District Court for applying the statute of limitations is consistent and in accordance with the standards long utilized by this Court. In the case of Urie v. Thompson, 337 U.S. 163 (1949), this Court discussed the purposes

of statute of limitations and noted how they are to be applied. As a general proposition, the traditional purposes of the statute of limitations was to insure and require that an injured party take legal action within a specific period of time after the party received notice of the invasion of his legal rights. As outlined in Argument I, the Plaintiff in the present matter knew of the Defendants' actions denying him tenure and awarding him a terminal contract not later than June 26, 1974. If these actions amounted to an invasion of Plaintiff's legal rights as he alleges, then he had the responsibility to seek legal redress for the same within three years from that date. His failure to do so bars him from seeking relief for these actions at a later time. The only identifiable act offered by the

Plaintiff and the Court of Appeals for determining that the Plaintiff's §1981 action was in fact timely filed is the expiration date of his terminal contract, June 30, 1975. Though utilizing this date, no reasons are offered for the same other than a reliance upon the position that the Title VII action was also timely filed on the basis of this date.

The purpose of §1981, inter alia, is to protect one against alleged discriminatory acts regarding the employment relationship. However, as previously noted, there are no allegations that the terms and conditions of this Plaintiff's employment subsequent to his denial of tenure status were in any way different from the terms and conditions the Defendants would afford any other person denied tenure. Thus, the offering, execution, and performance of the terminal

year contract in accordance with its terms cannot form the basis for a discrimination claim when this policy and the Defendants' actions in furtherance of it have not been alleged to be discriminatory. Rather, the discriminatory act was the Defendants' refusal to grant Plaintiff a permanent, indefinite position with Delaware State College. It is this refusal that the Plaintiff claims was discriminatory and these acts occurred not later than June 26, 1974. Thus, failing to file a complaint against the Defendants not later than June 26, 1977, bars the Plaintiff from receiving relief due to the Defendants refusal to grant him tenure.

Recently, this Court had the opportunity to review the appropriate application of a statute of limitations in the case of United States v. Kubrick, __ U.S. ___, 62 L. Ed.2d 259 (1979). In

reviewing the appropriateness of statute of limitations, this Court noted in Kubrick at page 266 that:

> Statute of limitations, which 'are found and approved in all systems of enlightened jurisprudence' [citations omitted] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free from stale claims in time comes to prevail over the right to prosecute them.'

Further, it was noted by this Court that these statutes protect Defendants and the Courts from having to deal with cases in which the factual determination of the matter is seriously hampered by the passing of time. In the present matter, it is clear that the Plaintiff is challenging the Defendants' determinations to deny him tenure, yet, the Plaintiff and the Court of Appeals both agree that in

addition to the three years that the Plaintiff had to bring this action, he should have the additional year comprising the terminal year contract. It was determined that Plaintiff is entitled to this additional time, though the terms, performance, and execution of the contract are not at issue in the Plaintiff's complaint. Thus, the determination by the Court of Appeals frustrates the purposes of the statute of limitations and should not be approved of by this Court.

In applying the pertinent statute of limitations in a recent case, the Court of Appeals for the Fifth Circuit in Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), noted the following concerning the application of the statute of limitations in a §1981 case at page 1255:

> "Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the last date on which Defendants improperly harmed Plaintiffs.... recoveries limited to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter."

Applying this rule to the present matter, the harm complained of by the Plaintiff occurred not later than June 26, 1974, when tenure was denied him and he was granted a terminal year contract. No harm arose out of the performance of the terminal year contract itself and, thus, the date of its expiration cannot serve as the accruing of Plaintiff's cause of action for being denied tenure.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the dismissal of the complaint against Petitioners (Pet. App. pp. 17a-19a) should be reversed.

Respectfully submitted,

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April, 1980

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners
[Additional Petitioners listed inside cover]

v.

COLUMBUS B. RICKS, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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*The other Petitioners are as follows:
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WILLIAM H. DAVIS,
WILLIAM G. DIX,
EDWARD W. HAGEMEYER,
JAMES C. HARDCASTLE,
DELMA LAFFERTY,
JAMES H. WILLIAMS,
WILLIAM S. YOUNG,
BURT C. PRATT,
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PIERRE S. DUPONT, IV,
M. MILFORD CALDWELL,
GEORGE W. MCLAUGHLIN,
ROMEO C. HENDERSON,
HARRIET R. WILLIAMS,
ARTHUR E. BRAGG,
ORA BUNCH,
EHSAN HELMY,
VERA POWELL,
JOHN R. PRICE,
HERBERT THOMPSON,
W. RICHARD WYNDER,
ULYSSES WASHINGTON, and
JANE LASKARIS.

M. MILFORD CALDWELL died on October 27, 1979.

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OPINIONS BELOW

The opinions of the court of appeals and of the district court are found at pages cited on page one of the petitioner's brief.

JURISDICTION

The jurisdiction of this court is as stated at page two of petitioner's brief.

QUESTIONS PRESENTED

1. Whether respondent filed a timely charge of national origin discrimination on a continuing violation within the time period required by 42 U.S.C. §2000-5(e).

2. Whether respondent's claim for relief pursuant to 42 U.S.C. §1981 accrued at a point in time within three years of which he filed a court complaint.

STATUTES INVOLVED

In addition to the statutes found at page ten and eleven of petitioner's brief, the following statute is involved.

> 86 Stat. 105 (1972), Title 42 U.S.C. §2000e-2(a) "It shall be an unlawful practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . ."

STATEMENT OF THE CASE

Respondent, Columbus B. Ricks, Ph.D. is a black male Liberian who was employed by the petitioner through the years 1970 to 1975 as a Professor of Education and Coordinator of Science Education. In February, 1973, he was considered for and denied academic tenure, but at the same time was given a one-year contract and advised that he would be considered for tenure the following year. In February, 1974, petitioner's Committee on Promotions and Tenure again recommended that respondent be denied tenure. Petitioner's Board of Trustees ("Board") met on March 13, 1974 and accepted the recommendation of the Committee on Promotions and Tenure. In April, 1974, Respondent filed a grievance with petitioner's Educational Policy Committee. In June, 1974, the petitioner's Board advised the respondent that he was being given a terminal contract for the year commencing on September 1, 1974 and terminating on June 30, 1975. (Pet. A. 3a-4a) At the same time, the Board advised respondent that the award of a terminal contract was to satisfy the requirements of the Board and of the American Association of University Professors (AAUP), whose guidelines it apparently thought to be governing. (A. 53)

By letter of September 12, 1974, respondent was advised by the Board that he was not being granted tenure. (A. 21) During the course of respondent's employment with petitioner, he was subjected to a continued series of events and incidents which ultimately deprived him of his employment because of his national origin (A. 16-18, 22-24). These events continued up through the end of his employment with petitioner in 1975.

On April 4, 1975, respondent filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[1] On June 7, 1977 respondent was

1. Although the court complaint (A. 24) states that the date of the charge is April 7, 1975, a copy of the EEOC charge indicates the date of filing to be April 4, 1975 (Court of Appeals A.-18).

sent a right to sue letter by the United States Department of Justice. On September 9, 1977 respondent filed a complaint in the United States District Court for the District of Delaware. Relevant portions of the complaint allege that he was discriminated against and terminated because of his national origin in violation of 42 U.S.C. §2000(e)-5 (Title VII) and 42 U.S.C. §1981 (1981) (Pet. A. 4a).

The district court dismissed the Title VII claim on the basis that respondent failed to file a charge with the EEOC "within 180 days after the alleged unlawful employment practice occurred" as required by 42 U.S.C. §2000(e)-5(e). The district court also dismissed the Section 1981 claim as barred by the three-year Delaware statute of limitations governing such claims. It also dismissed several other claims alleged by respondent. Respondent appealed from the district court's dismissal of the Title VII and 1981 claims only (Pet. A. 4a-5a). On September 18, 1979 the United States Court of Appeals for the Third Circuit entered a judgment reversing the dismissal of the Title VII and 1981 claims and remanding the matter for proceedings consistent with its opinion (Pet. A. 19a). Petitioner sought review by way of Certiorari, and an order allowing Certiorari was entered by this Court on February 19, 1980 (A. 103).

SUMMARY OF ARGUMENT

The question that is raised by this appeal is when under the particular statutes in question, Title VII and 42 U.S.C. §1981, does a violation occur. Petitioner and respondent are in agreement that the appropriate and relevant time period during which a charge of discrimination must be filed with the EEOC and within which a lawsuit must be filed under 42 U.S.C. §1981 are 180[2] days and three years[3] respectively.

The question for this court is when on the peculiar facts of this case did the violation of Title VII and 1981 actually occur. This will be determined by the date which this Court holds to be the last act of discrimination and by whether or not this Court concludes, as did the court of appeals, that the violations alleged were continuing. On the record before it, the court of appeals held effectively that the respondent alleged sufficient facts to withstand a motion to dismiss on the issues of whether his charge was timely filed with the EEOC and of whether his 1981 claim had been instituted within three years of the statute of limitations governing such claims. The standard applied in such a review is that enunciated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That test is that a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted only if ". . . it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." With respect to Title VII, the court of appeals held that the latest violation of that statute occurred at the end of respondent's employment with petitioner on June 30, 1975, the last day on which he worked for the petitioner. It further held on the record before it that the violations alleged by the petitioner were continuing in nature.

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2. 42 U.S.C. §2000e-5(e)
3. 10 Del. C. §8106

With respect to the 1981 claim, the court of appeals held that the violation alleged thereunder occurred also on June 30, 1975 and consequently, the instant lawsuit instituted within three years of that date was not barred by the statute of limitations agreed by both parties and held by the court of appeals to govern this claim.

ARGUMENT

I. The Respondent Alleged Violations Of Title VII Which Were Continuing In Nature and Concluded At His Termination On June 30, 1975.

Respondent has alleged in his complaint that petitioner and its agents engaged in a course of conduct that discriminated against him because of his national origin. Specifically, he has alleged that the actions of the petitioner in denying him tenure and terminating him discriminated against him because of his national origin. He has alleged that this course of conduct commenced in 1972 when he was not considered for tenure on schedule and continued to the conclusion of his employment on June 30, 1975.

Petitioner argues that the respondent should not be allowed to pursue this claim in court because the actions alleged by respondent are barred by a time limitation set forth in Title VII. That time limitation provides that a charge alleging discrimination under Title VII must be filed within 180 days of the date of the alleged violation. Respondent does not dispute that charges alleging a violation occurring outside of the 180 day period are untimely and cannot form the basis, either of an EEOC charge or of a court suit arising out of such charge. On the other hand, however, a charge alleging that a violation occurred within 180 days of its filing is a timely charge and may be the subject of a lawsuit instituted to redress those violations. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Petitioner and respondent are in dispute only as to when on the facts of the instant case the alleged violation of Title VII took place.

Respondent's charge before the EEOC (A. 29) filed on April 4, 1975 alleges that he would be terminated on June 30, 1975 because of his national origin. It is respondent's position that a timely charge in this matter could be filed at any time up to 180 days after his date of discharge on June 30, 1975. Further, it is respondent's

position that the fact that he filed the charge approximately two months before the date of discharge should be of no legal consequence in this Court's consideration and ultimate determination as to the exact time at which the charge would have been filed. *Egelston v. State University College at Genesco*, 535 F.2d 752 (2nd Cir. 1976); *Noble v. University of Rochester*, 535 F.2d 756 (2nd Cir. 1976).

The substance of respondent's complaint is that during the course of his employment with petitioner he was subjected to a course of conduct that was designed to remove him from his employment with petitioner. That conduct was effected over a long period of time, commencing in February, 1972 when he was initially not considered for tenure and continuing on up into 1973 and 1974 when on two other occasions, he was denied tenure. In the interim, and thereafter, respondent was subjected to a course of conduct that made his teaching conditions intolerable. Among other things, he was falsely accused of being a poor teacher, insulted in front of his students, pressured to change student's grades, had his job duties as Coordinator of Science Education and Director of UPSTEP interfered with, denied the opportunity to teach summer and night school, threatened with bodily harm, urged to resign, had his teaching methods interfered with, replaced in his position by a less qualified black American, had his teaching responsibilities removed from him, denied equal pay, and denied books and instructional materials. (A. 16-18)

These events occurred from the years 1972 through 1975 and caused him to be without tenure and subjected him to discharge. In addition, after Dr. Rick's most recent denial of tenure in February, 1974, petitioner's Trustees engaged in a review of that denial and on September 12, 1974 concluded that the denial was appropriate. Although Dr. Ricks was awarded a terminal contract on June 30, 1974, commencing September 1, 1974, and concluding on June 30, 1975, the contract

when issued was awarded to comply with certain Board of Trustees and AAUP requirements. It was clearly stated in the cover letter thereto that "should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board." Notwithstanding the district court's finding that the operative date on which the violation of the statute occurred was June 30, 1974 when the terminal contract was awarded, this letter from the President of the Board of Trustees indicates from the face thereof that this action, the award of the terminal contract, was perfunctory and revocable. (A. 52-53). In fact, the Trustees did act thereafter and by letter of September 12, 1974, Dr. Ricks was notified of the fact that the decision would stand. Despite this act, he was evaluated thereafter by his Department Chairman in January, 1975 to measure his performance. The record is unclear as to why this was done, but it should suffice to say that respondent believed it to be a part of a continuing pattern of discrimination engaged in by petitioner. In addition, on December 4, 1974, respondent was assaulted by his former department chairman. At about the same time he petitioned the petitioner's president for reconsideration of his entire case given the highly irregular nature of the proceedings which progressed from 1972 through January, 1975 (A. 21-24).[4] When it became clear to respondent that his employment was to conclude in his discharge on June 30, 1975, he filed his charge of discrimination on April 4, 1975 with EEOC.

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4. Although the district court in its opinion (Pet. A. 280) concluded that respondent conceded at oral argument that there were only two points at which the 180 day period provided for in 42 U.S.C. §2000e-5(e) could have commenced, that conclusion misconstrues the record. A reading of the colloquoy between the court and counsel fails to reveal such a concession. (A. 76-77)

Despite the petitioner's contention that the procedure for tenure employed by it is highly regularized and that it concluded at the latest in February, 1974, clearly the course of conduct described in the respondent's pleadings and above indicate protracted and continuous activity on the part of the petitioner to deprive the respondent of his employment at the earliest opportunity available to petitioner, on June 30, 1975.

Respondent believes that the court of appeals was correct in holding that the discrimination alleged by him was continuing in nature, and that accordingly, inquiry should be made at trial as to the merits of his discrimination claim. Petitioner is in no way prejudiced by this consideration. Petitioner suggests in its brief that this is a matter that was dormant for over a year and one which respondent sought to revive by filing a charge with EEOC in April, 1975. In fact, the matter had been an ongoing one from and after 1972. This is factually different from the situation in *United Airlines v. Evans*, 431 U.S. 533 (1977), on which petitioner relies. In that case respondent therein sought to address a claim of discrimination through an attempt to raise the adverse effects of earlier taken actions which had ceased more than 180 days before the charge which formed the basis of his lawsuit was filed. No charge of discrimination had been filed with respect to the earlier taken action that had occurred more than 180 days before the charge on which her court suit was filed.

United Airlines v. Evans, 431 U.S. 553 (1977), does not abolish the long established doctrine of continuing violations under Title VII. *Evans* precludes the application of the continuing violation concept in circumstances where an individual files a charge alleging a violation to be the present effect of past discrimination, where the past violation is an event that occurred more than 180 days before the filing of the charge, and where the past violation has not itself been the subject of a charge within 180 days of its occurrence. *Bracamontes*

v. Amstar Corporation, 576 F.2d 61 (5th Cir. 1979); *Farris v. Board of Education of St. Louis*, 576 F.2d 765 (8th Cir. 1978); *Masco v. United Airlines*, 547 F.2d 1127 (3rd. Cir., 1977).

The aspect of continuing violation abolished in *Evans* is that alleged by the employee in that case who continued to feel the effects upon her return to employment, of previous discrimination for which she had not sought relief. The continuing effects alleged were the denial of seniority and concomitant benefits. Courts have since *Evans* held that continuing violations are cognizable under Title VII, provided that the charges are filed within 180 days of the time the violations end. So long as a violation continues, then a charge may be filed until it ceases. *Reed v. Lockheed Aircraft Corp.* — F.2d —, 22 EPD, ¶30,602 (9th Cir. 1980); *Clark v. Olincraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

Further, *Evans* does not abolish cases decided pre-Evans that do not come under the *Evans* doctrine. *Noble v. Rochester*, 535 F.2d 756 (2d Cir. 1976), *Egelston v. State University at Genesco*, 535 F.2d 752 (2d Cir. 1976) and *Jacobs v. Board of Regents*, 473 F.Supp. 663, 668 (S.D. Fla. 1979), are all cases where violations continued up to a point after the charge was filed.

The question that *Evans* mandates is when a continuing violation is alleged, is there a present violation which continues? The court of appeals below answered this in the affirmative because upon reviewing the course of conduct engaged in by the petitioner, it was clear to that court that respondent was continuously subjected on an on-going basis of conduct which was meant to deprive him of his employment on June 30, 1975. It should be noted that *Abramson v. University of Hawaii*, 594 F.2d 202, 209-210 (9th Cir. 1979) cited by petitioner was in fact remanded for consideration of whether the tenure process was irregular in that *Abramson* did not have her tenure reconsidered in her terminal year as she alleged by affidavit was frequently

the case. *Abramson* acknowledged that reconsideration of tenure would be either a violation itself or a continuing violation of the statute. Further, *Abramson* itself rules out the concept that reconsideration for tenure constitutes the revival of a prior stale claim such as would be barred by *United Airlines v. Evans*.

The court of appeals in the instant case found that during the course of his employment with the petitioner there might have been times at which he could have filed a charge alleging a continuing violation. Although it did not specifically state at what point those times occurred, respondent respectfully suggests that one of them might have been the point at which respondent was assaulted by his former department chairman, or at which he was re-evaluated and petitioned the president of the college to look into the matter because of the rather irregular events that were occurring. The earliest of these events, the assault, occurred in December, 1974. Assuming for the sake of argument that it occurred at the earliest point in December that it could have occurred (December 1), respondent would have had to file his EEOC charge by June 1, 1975. Clearly, his charge, filed within that time would be timely.

A further reason exists for finding that respondent's charge alleging that the ending of his employment by the petitioner was discriminatory, was timely. Discharge is a process in an academic institution. That process culminates when the employee ceases to render any services to the institution. If a discharge is alleged to be discriminatory, then clearly the entire process which created the discharge must be reviewed.

42 U.S.C. §20003-2(a) protects an employee from a variety of discriminatory conduct on the part of an employer. Among those from which an employee is protected is discriminatory discharge. If this particular section of Title VII is to afford protection to employees of academic institutions, then it is logical and reasonable to conclude that such an employee has the same right to be

free from having his employment ended in a discriminatory fashion as does an employee of any other institution. Employees of academic institutions must have the same right to be free from discriminatory discharge as do employees at non-academic institutions.

If one looks for guidance as to when a discharge violation occurs in a non-academic institution, one will find that the cases have held that a discharge occurs when the employee ceases to render his services to the institution. *Chappell v. Emco Machine Works Co.*, 601 F.2d. 1295, 1304 (5th Cir. 1979); *Bethel v. Jefferson*, 589 F.2d 631, 645 (D.C. Cir. 1978); *Payne v. Crane*, 560 F.2d 198, (5th Cir. 1977); and *Greene v. Carter Carburetor*, 532 F.2d 1256 (8th Cir. 1976) are cases wherein the court held that the date of violation arose in an allegation of discriminatory discharge when the employee last rendered services to the institution, not at a later date when pay and benefits ended. Further, *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1979) held that under the Age Discrimination in Employment Act (ADEA)[6] an alleged violation of that statute alleging discriminatory discharge occurred on the last day the employee worked, not on his date of separation from the payroll.

As this court has held that the language of the two statutes, Title VII and ADEA, are similar and that a particular construction under similar sections of one of the statutes is strong support for a similar construction under the other, respondent urges this court to follow that precept here as well. *Oscar Mayer and Co. v. Evans*, — U.S. —, 99 S.Ct. 2066 (1979).

Further, it should be noted that *Electrical Workers v. Robbins and Meyers, Inc.*, 429 U.S. 229, 234-235 (1976) recognized the date of discharge as the date of violation. In *Robbins and Meyers*, petitioner argued that a grievance procedure tolled the time for filing a charge

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6. 29 U.S.C. §631 *et seq.*

because the discharge of the employee occurred at the conclusion of the grievance procedure rather than the date of discharge which was the last day worked. This Court held that the time for filing of a charge occurred at the time when the employee in question last rendered services to the employer.

II. Respondent Alleged Violations Of 42 U.S.C. §1981 Which Continued To A Date Within The Three Year Statute Of Limitations Within Which He Was Required To And Within Which He Filed A Complaint In Court.

What can be said of the Title VII claim can be said of a 1971 claim as well. Respondent does not dispute the fact that Title VII and 1981 provide separate and independent bases for relief. *Johnson v. Railway Express Agency*, 421 U.S. 545 (1975). Indeed this court has held in *Johnson* that the same facts can give rise to separate claims and that the remedies are independent of one another. However, the fact that the same facts can give rise to separate and independent claims does not mean that the same facts cannot activate the separate statute of limitations in each of the statutes.

The statute of limitations in 1981 is admittedly the three-year statute of limitations held to apply by both the district court and the court of appeals. Further, petitioner and respondent are not disputing in this Court which statute of limitation applies. Both agree that the three-year statute of limitations applies to this claim. The only question raised by this issue on appeal is from what point in time the three-year statute runs. Petitioner contends that it runs from the date of notice of the terminal contract for that is the time when the respondent knew or should have known that his legal rights had been invaded. Respondent does not dispute the legal principle that the statute of limitations on a claim such as this runs from the time at which an individual has knowledge that his legal rights have been invaded.

United States v. Kubrick, — U.S. —, 62 L. Ed. 2. 259 (1979). Respondent disputes that he had such knowledge as of the time it is ascribed to him by petitioner. As with the Title VII claim, respondent urges that the conduct of the petitioner continued over an extended period of time and concluded only at the time when respondent became separated from his employment on June 30, 1975. As he filed his court suit on this claim within three years of that date, he did so within the time period provided for by the statute of limitations and his claim is properly before the court.

Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979) holds that the relevant date for purposes of calculating the statute of limitations is "the last date on which a Defendant improperly harmed the Plaintiff . . ." Respondent submits that this date is the last day that he worked for petitioner. He bases his assertion on the fact that conduct of the employer continued over an extended period of time as previously argued in this brief. That conduct caused him to be separated from his employment on June 30, 1975 and is indeed the last date on which he was harmed by the petitioner. On that basis, the court of appeals' holding is correct and is not inconsistent with that of the Fifth Circuit in *Bernard*.

Finally, petitioner suggests that it has an interest in knowing a point will come at which it will not have to concern itself with respondent's claims once they have become stale. The position urged by the respondent here and held by the court of appeals below is not inconsistent with that policy. As the conduct complained of by respondent was on-going conduct and from the record, conduct actively pursued by the petitioner at least up through December, 1974 when respondent was assaulted, it cannot be said to be a stale claim when suit was filed within three years of that date. Petitioner is in no way prejudiced by having to defend this claim. Clearly, it has actively engaged in the conduct which gives rise to it at a time well within the statute of limita-

tions. Nevertheless, should this court decide that an earlier date, such as the date on which the Board of Trustees issued its final decision, September 12, 1974, is the appropriate time at which respondent knew that his rights were invaded, then it should still hold that this claim is not time-barred by the statute of limitations for clearly the court suit filed on September 7, 1977 was filed within three years of that date.

Respondent urges that this Court view the harm or legal injury to respondent in its appropriate light, as harm or injury which is essentially from his termination from employment which occurred on June 30, 1975.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals which reversed the dismissal of the district court should be affirmed.

Respectfully submitted,

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No. 79-939

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

DELAWARE STATE COLLEGE, *et al.*,
Petitioners
[Additional Petitioners listed inside cover]

v.

COLUMBUS B. RICKS, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION

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*The other Petitioners are as follows:
WALTON H. SIMPSON,
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WILLIAM G. DIX,
EDWARD W. HAGEMEYER,
JAMES C. HARDCASTLE,
DELMA LAFFERTY,
JAMES H. WILLIAMS,
WILLIAM S. YOUNG,
BURT C. PRATT,
LUNA I. MISHOE,
PIERRE S. DUPONT, IV,
M. MILFORD CALDWELL,
GEORGE W. MCLAUGHLIN,
ROMEO C. HENDERSON,
HARRIET R. WILLIAMS,
ARTHUR E. BRAGG,
ORA BUNCH,
EHSAN HELMY,
VERA POWELL,
JOHN R. PRICE,
HERBERT THOMPSON,
W. RICHARD WYNDER,
ULYSSES WASHINGTON, and
JANE LASKARIS.

M. MILFORD CALDWELL died on October 27, 1979.

TABLE OF AUTHORITIES

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No. 79-939

IN THE
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October Term, 1979

DELAWARE STATE COLLEGE, *et al.*,
Petitioners
[Additional Petitioners listed inside cover]

v.

COLUMBUS B. RICKS, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

The recent decision of this Court in the case of *Mohasco Corp. v. Silver*, Docket No. 79-616, October Term, 1979, decided on June 29, 1980, suggests an alternative legal analysis which is both appropriate to the facts of the instant case and supportive of respondent's argument that a timely charge was filed with the Equal

Employment Opportunity Commission (EEOC). The Court will recall the holding of *Mohasco* that no charge of discrimination can be filed where the charging party is located in a jurisdiction which has a local agency charged with the enforcement of a law prohibiting employment discrimination until 60 days after the filing of such a charge with that local agency unless the state proceedings terminate before the expiration of sixty days.[1] Any charge filed with the local agency must be

1. *Mohasco* was concerned with when a charge can be deemed filed pursuant to 42 U.S.C. §2000e-5(c). That section of the statute reads as follows:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person ag-

filed with the EEOC within 300 days after the occurence of the violation.

The respondent in the instant case filed a charge of discrimination with the EEOC and with the Delaware Department of Labor, the local agency which enforces the anti-discrimination employment laws in Delaware[2] (App. Pet. for Cert. 25a and 26a). The charge was filed with the Delaware agency on April 11, 1975. The charge with the EEOC was filed at the earliest on April 28, 1975.[3] Assuming a filing with the EEOC on April 28, 1975, July 2, 1974 is the date 300 days prior thereto.

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grieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

2. 19 Del. C. §712(d) provides as follows with respect to the filing of a charge of employment discrimination under Delaware law:

> (d) A charge under subsection (b) must be filed within 90 days after the alleged unlawful unemployment practice or 120 days after discovery thereof whichever is the later.

3. Although the Appendix before this Court indicates that the charge of the respondent was filed with the EEOC on April 4, 1975, it is clear under *Mohasco* that since a charge had to be filed with the state agency first and the charge was filed on April 11, 1975 with the state, the earlier submission of the charge to EEOC on April 4, cannot be deemed a filing with that agency. However, Exhibit "C" attached to the Memorandum in Support of the Plaintiff's Opposition to Defendant's Motion for Dismissal and Summary Judgment filed in the District Court, reveals that the local agency, the Delaware Department of Labor, waived jurisdiction over this matter by a letter dated April 28, 1975. The earliest date then that the charge can be deemed filed with the EEOC would have been April 28, 1975. The July 2, 1974 date is the date which the respondent calculates to be 300 days prior to the April 28, 1975 date. Respondent urges this Court to treat the period from April 4, 1975 to April 28, 1975 as a period during which, in accordance with *Love v. Pullman Co.*, 404 U.S. 552 (1972), the charge was held in "suspended animation" and as automatically filed when the state agency terminated proceedings by waiver on April 28, 1975.

Within that period of time it is alleged that violations of 42 U.S.C. §2000e-5 (Title VII) occurred. A specific event alleged to have occured within that 300 day period and which has already been identified in the Statement of the Case of the Respondent's Brief in Opposition to Certiorari is the issuance of a letter of September 12, 1974 by the Board of Trustees to respondent informing him that he would not be granted tenure (A.21). In addition other events appearing in the record but not identified in the Appendix before this Court are the signing by the college president on August 16, 1974 of the terminal contract to which the letter of June 26, 1974 (A.21) to Dr. Ricks refers. The contract was signed by respondent on September 3, 1974. (Exhibit "B" of Moving Defendant's Opening Brief in Support of Summary Judgment in the District Court). As those events occurred within 300 days of the filing of the charge with the EEOC, after the filing of the charge with the local agency, it should be apparent that the charge with the EEOC is timely and forms an appropriate basis for the Title VII claim of the respondent's lawsuit.

Respondent has previously argued in his Brief in Opposition that the conduct engaged in by the petitioner was a continuing violation of Title VII. However, even assuming for the sake of argument that the course of conduct outlined in respondent's Statement of the Case in his Brief in Opposition filed in this Court is not, as respondent alleges, a continuing violation but is viewed rather as individual and isolated acts standing alone, each of the two acts identified above, i.e., the execution of the contract on August 16, 1974 on behalf of the college and its being giving force by the execution on September 3, 1974 by Dr. Ricks and the letter of September 12, 1974 from the Board of Trustees to the respondent denying him tenure, occurred within 300 days of the filing of the charge with the EEOC and are timely.

In conclusion, respondent urges that the Court hold that since the charge was in fact filed with the EEOC within 300 days of an act alleged to be in violation of Title VII, and had been filed previously with the state agency, that the charge was in fact timely filed with the Equal Employment Opportunity Commission and does in fact form a proper basis for the court complaint in this matter. Such a finding compels an affirmance of the judgment of the court of appeals which reversed the dismissal of the district court.

Respectfully submitted,

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No. 79-939

IN THE

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OCTOBER TERM, 1979

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Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent and some Amici Curiae[1] have attempted to expand the issue that

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[1] United States and Equal Employment Opportunity Commission who will hereinafter be referred to as EEOC.

the parties presented to the lower courts for their consideration[2] (Pet. App. 5a, 13a).

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[2] The District Court noted in its opinion of August 30, 1978, (Pet. App. 5a, 13a) that Plaintiff was only relying upon acts relating to the denial of tenure and the termination of his employment for his Title VII claim based upon Plaintiff's representations made at oral argument (J.A. 75-79). After the District Court's initial decision, Respondent failed to dispute this determination in his Rule 59(e) Motion for Reconsideration and brief submitted in support of the same. On appeal, Respondent did not dispute this matter or identify other unrelated acts to the Court of Appeals in his Statement of Issues (J.A. 99,100) or Argument. Only now do Respondent and EEOC seek to raise additional issues (Respondent's Brief, p.7, 8; EEOC Brief, p.4, 5). EEOC asserts that the Respondent was relieved by teaching duties in October 1974. This has never been asserted by Respondent, who continued performing teaching duties until the spring term and his contract expired. These issues, which have been abandoned by the Respondent since briefing in the District Court, are not properly before this Court for consideration, Neely v. Martin K. Eby Const. Co., 386 U.S. 317 (1967), Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976). Moreover, these new issues pertain to the conduct of Defendants McLaughlin and Caldwell. Neither of these persons were identified in any of the complaints filed with either the Federal or State discrimination agencies. These actions were not identified in administrative filings, and

ARGUMENT I

A DENIAL OF TENURE STATUS IS A DISCRETE AND IDENTIFIABLE EMPLOYMENT PRACTICE REQUIRING AN EMPLOYEE TO FILE A CHARGE OF DISCRIMINATION WITHIN THE TIME LIMITATION REQUIREMENTS OF 42 U.S.C. §2000e-5(e) AFTER SUCH A DETERMINATION IS MADE.

Assuming that Respondent is limited to the issues he raised in the courts below, Respondent and Amici[3] argue that the denial of tenure occurred at the expiration of the Respondent's last contract, June 30th, 1975, despite the fact that Respondent filed his complaint with the EEOC on April 4th, 1975[4].

Respondent has conceded that the District Court did not have personal jurisdiction over Defendant McLaughlin (Respondent's Mem. In Opposition to Defendant's Motion to Dismiss p. 26,27). Defendant Caldwell died on October 27th, 1979.

[3] An additional Amici supporting the Respondent's position is the American Association of University Professors, hereinafter referred to as AAUP.

[4] Petitioners contend that this date is still of significance to the Respondent given the applicable law and facts of this case as explained in Argument II, infra.

In order to find a timely filing in this case, Respondent argues that the denial of tenure in March of 1974 was a continuing discriminatory occurrence through the expiration of the terminal year contract[5], thereby allowing a timely filing sometime subsequent to the decision to deny tenure through the expiration of the contract.

The EEOC, on the other hand, admits that the determination to deny Respondent tenure constitutes an occurrence within the definition of 42 U.S.C. §2000 e-2(a)(1) (EEOC Brief 15, 16). In fact, EEOC admits that the Respondent could have filed a complaint in the spring of 1973 when Respondent was initially denied

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[5]This "continuing violation" theory was adopted by the Court of Appeals (Pet. App. 13a-15a) which is indistinguishable from the reasoning of Judge Adams in Evans v. United Air Lines, Inc., 534 F.2d 1247, 1250 (7th Cir. 1976) which was rejected by this Court.

tenure and again in the spring of 1974 when tenure was again denied. Further, it admits that tenure does "significantly affect the faculty member's job security, prestige and compensation" (EEOC Brief page 16). In fact, the Tenure Policy of Delaware State College designates the extent of one's job security in light of tenure decisions (See Tenure Policy pp. 46-49, Exs. to Petitioners' Reply Brief, District Court). A decision on tenure obviously affects a person's terms, conditions and privileges of employment. However, the EEOC suggests that one also can complain when his contractual relationship expires by its terms.

It is on this basis that the EEOC contends that United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) is inapplicable to the present situtation. It is argued that the expiration of the Respondent's terminal year contract "was not an attenuated consequence of an earlier

employment practice", as was the case in Evans.[6] The undisputed and unchallenged practices of the Petitioner College concerning the effects of a denial of tenure unequivocally establish the fact that a terminal year contract is offered and no further employment will be granted a person denied tenure for the second time. Here, there is no doubt that the denial of tenure was the earlier employment practice which resulted in the "attenuated" consequence of the expiration of the Respondent's terminal year contract. Thus, the EEOC's analysis of Evans clearly supports Petitioners' position that the focal point of the Respondent's complaint was his denial of tenure and not the mere expiration of a fully performed academic year contract.[7]

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[6] (EEOC Br. 19.)

[7] What occurred to Respondent in this case is very similar to a situation where a employee during the course of his

In support of Respondent's position, the AAUP suggests that a denial of tenure does not change any of the rights accorded a faculty member (AAUP Brief 14)[8]. The Tenure Policy of the Petitioner of College clearly refutes this contention. The obvious right denied the faculty member is

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employment is denied a promotion or certain seniority benefits, and as a result of such denial, thereafter when unrelated layoffs are required, the lack of these benefits result in this employee being laid off. The uniform application of the layoff procedure is not the eventuality which the employee should have challenged, but rather the failure to receive certain promotional or seniority rights when they were denied him. In the present case, Respondent has not alleged that the college policy regarding employees denied tenure twice has been discriminatorily applied in this case. Rather, Respondent only challenges the denial of tenure itself. Thus, the effect of a neutral policy does not establish a second discriminatory occurrence, cf. United Air Lines v. Evans, supra, at 557, 558.

[8] AAUP argues that since no rights have changed when tenure is denied, there is no reason to complain until a teacher no longer has employment.

indefinite employment in the future. In addition to that, he is not entitled to any further employment beyond the terminal year contract, nor is he entitled to be considered for tenure again. Additionally, such an employee is not eligible to participate in faculty positions or functions requiring tenure status.

Respondent fully appreciated the significance of the same as evidenced by his actions. After the denial, he procured legal counsel and sought to utilize the grievance procedures (J.A. 49-52) to question the decision to deny him tenure, and he filed a charge with the EEOC prior to the expiration of his contract with the College. All these acts clearly refute the argument that Respondent did not believe his rights were not affected by the denial of tenure.

Respondent's position also creates stale claims. The latest tenure decisions complained of were made in February and

March of 1974. Yet, Respondent argues he need not act until December 1975. Moreover, assuming a timely filing was made initially with the State agency, which took no action, it is possible that an actual investigation of this complaint would not be initiated until almost 300 days subsequent to June 30, 1975 which would mean that the Petitioners might first be advised of this complaint in April of 1976, two years subsequent to the time that the tenure decisions were made. Such a practice would clearly frustrate the intent and purpose of the filing requirements of 42 U.S.C. §2000e-5(e).[9]

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[9] It is difficult to understand how a person benefits by being required to wait until he is unemployed or reemployed elsewhere to contest a decision which was arrived at more than a year prior to his unemployment. It would appear to be to the employee's advantage to have a claim of discrimination processed as quickly as possible subsequent to its occurrence, thereby giving the employee the opportunity to have the matter resolved prior to him becoming unemployed and placed in an economically distressful status.

ARGUMENT II

THE COURT OF APPEALS APPLIED THE APPROPRIATE 180 DAY TIME PERIOD TO RESPONDENT'S CLAIM UNDER THE FACTS OF THIS CASE.

Through the initial briefing of this case in this Court, all parties and the Courts deciding this case utilized the 180 day filing requirement of 42 U.S.C. §2000e-5 (e)[10]. Respondent now claims that one who fails to file a timely claim with the state agency and further fails to file any claim with any agency within 180 days of the occurrence is still entitled to utilize the 300 day limitation period. Neither the decisions of this Court nor the statute at issue warrant acceptance of the Respondent's position.

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[10] The precedent in the Court of Appeals was consistent with this position, Bonham v. Dresser Industries, Inc., 569 F.2d 187, 192 n. 5 (3rd Cir. 1978). In Bonham the Court noted that to allow a person who untimely filed a claim with the State agency to take advantage of the 300

Respondent and the EEOC are attempting to utilize the 300 day filing period for the purpose of bringing certain, otherwise, stale claims within the purview of the Title VII claim asserted. Respondent relies upon Mohasco Corp. v. Silver, No. 79-616, 48 U.S.L.W., 4851 (June 23, 1980) for claiming entitlement to the 300 day limitation period.

A significant factual and legal distinction between the present matter and that of Mohasco pertains to the filing of a timely complaint with the appropriate state agency. Under New York law, a discrimination complaint can be filed up to one year after the occurrence. Further, the Court found that a complaint filed 291 days subsequent to the occurrence

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day filing requirement would allow claimants to intentionally wait until the State filing period runs and then take advantage of the longer Federal filing period. The Court noted that this surely was not the intent of Congress.

with the New York agency was a timely filing.[11] The opinion in Mohasco merely outlines how such a timely filing, though made subsequent to 180 days from the occurrence, can be timely filed with the EEOC within the 300 day period.[12]

Respondent and the EEOC assert there is no requirement to file within 180 days of an alleged discriminatory occurence

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[11] Mohasco Corp. v. Silver, at 4851 n. 4, 4852.

[12] Though it is not certain from the opinion, it would appear that the Petitioner in Mohasco was attempting to assert that the filing requirements of 42 U.S.C. §2000e-5(c) and (e) required a person to file a complaint with either the federal or state agency not later than 180 days notwithstanding the fact that a filing with a state agency subsequent to 180 days but less than 300 days amounted to a timely filing with the State agency, Olson v. Rembrandt Printing Co., 511 F.2d 1220 (8th Cir. 1975). This argument, that Congress designated a 180 day filing requirement with all state agencies, was rejected citing with approval the holding and analysis of Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976). In Doski, the Court accepted the EEOC's contention that the filing requirements of 42 U.S.C.

even when the initial filing with the State agency is untimely and greater than 180 days from the date of the alleged discriminatory occurrence. Respondent's position is not supported by Mohasco supra, Love v. Pullman Co., 404 U.S. 522 (1972) nor Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). None of these cases considered an untimely filing such as Respondent's [13].

Since Respondent has failed to identify any discriminatory acts occurring within 180 days of his filing with the EEOC, it is clear that no such acts come within Delaware's shorter 120 day period. Moreover, even if a tolling concept were adopted, as suggested in EEOC v. Delaware

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§2000e-5 do not require a person to file a complaint with the State agency within 180 days provided that State law allows a longer period for filing.

[13] In these three cases a timely filing was made either with the deferral state agency or with the EEOC within the shorter federal period (90 or 180 days).

Trust Co. 416 F. Supp. 1040, 1044 n. 9 (D. Del. 1976) on the date that a charge was filed with the EEOC, Respondent still cannot identify an occurrence regarding his denial of tenure that was timely filed.[14]

The actual offering of a contract in August of 1974 and the denial of Respondent's grievance have been offered

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[14] The only allegations that come within 180 days of the April 4, 1975, filing involve Defendant McLaughlin's alleged assault upon Plaintiff and the allegation that the President of the College subsequent to that assault refused to reevaluate Plaintiff's tenure status. The assault allegations are totally irrelevant to the denial of tenure which occurred in the spring of 1974, nor were they properly made a part of Plaintiff's complaint to the EEOC. (Ct. of App. A. 18) Additionally, there are no allegations that subsequent to the Board of Trustee's determination to deny Plaintiff tenure, there exist additional proceedings wherein the President of the College can review and reverse this decision. Informal requests for reconsideration are not sufficient to breath life into a stale claim, United Airlines v. Evans, 431 U.S. 553, 556 (1977); see also Meyers v. Pennypack Woods Home Ownership Assn., 559 Fed. 2d 894, 899 (3d Cir. 1977).

as occurrences for which a complaint was timely made. (EEOC Br. 24, 26, Resp. Br. 8) However, the August act occurred 237 days prior to the Respondent's filing with the state agency and 230 days prior to his filing with the EEOC for purposes of tolling the state statute of limitations. The September 12, 1974 occurrence was 210 days prior to filing with the state agency and 203 days prior to filing with the EEOC. Both of these occurrences were beyond the state statute of limitations of 120 days and would be untimely filed for state consideration even utilizing the 180-day filing period noted by the Court recently as means to insure meaningful resort to state administrative proceedings.[15]

The EEOC's own regulations do not support this position. Only

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[15] Oscar Mayer & Co. v. Evans, 441 U.S. 750, 764 n. 11 (1979)

complaints received by the EEOC, which are more than 180 days from the date occurrence and still within the state agency period of limitations get deferred pursuit to the requirements of Love v. Pullman Co., supra, 29 C.F.R. 1601.13(d)(2)(iii) (1979). An identical regulation existed at the time of the Doski decision, 29 C.F.R. §1601.12(b)(1)(v)(A) (1975).

In Mohasco Corp. v. Silver, supra, the approach utilized in Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) was approved. However, the issue of a timely filing with the state agency was not presented in Moore, nor is there anything in Moore to indicate that state statutes of limitations have no role in the filing requirements of a Title VII claim.[16]

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[16] In Moore the Plaintiff was discharged on October 17, 1967, and filed with the State agency on October 19, 1967. At the time of the filings, Illinois had a 120-day statute of limitations, 48 Ill. Anno. Stats. §858 (1961). Additionally,

Respondent and EEOC contend that the mere filing of a complaint well beyond the state statute of limitations period and the 180-day federal limitation period should be treated as a bonafide state referral, though on its face the state agency has no authority to pursue such stale claims.[16a] Petitioners do not believe that such a result was intended by the language of the statute or the Congress. Recently, the relationship between State and Federal proceedings in the Title VII area were reviewed. New York Gas Light Club, Inc. v. Carey, ____ U.S.____, 64 L.Ed. 2d 723 (1980). In particular, the Court noted the

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the last pertinent date considered by the Court was an allegation of harassment requiring the Plaintiff to seek a transfer which was requested on August 7, 1967. Clearly, either of these dates complied with the state statute of limitations. Thus, there was no issue concerning a "bonafide" deferral to the state agency.

[16a] 19 Del. C. §712(b) which authorizes the agency to investigate discrimination charges is contingent on

congressional intent that state and federal remedies should supplement one another. It was noted at page 734 that:

> "Congress envisioned that Title VII's procedures and remedies would 'mes(h) nicely, logically, and coherently with the state and city legislation,' and that remedying employment discrimination would be an area in which [t]he Federal Government and the State Governments could cooperate effectively." 110 Cong. Rec. 7205 (1964) (Remarks of Senator Clark).

Acceptance of the Respondent's position would effectively eliminate the requirement of complying with state filing requirements which are no more onerous than the 180 day federal requirement, or require State agencies to disregard their statutory jurisdictional requirements and act upon stale claims. Such results

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such charges being timely filed. 19 Del. C. §712(d):

> A charge under subsection (b) must be filed within 90 days after the alleged unlawful employment practice or 120 days after discovery thereof, whichever is the later.

surely do not comport with the congressional intent of meshing the federal and state remedies.

Many courts have rejected the position asserted by the Respondent on the basis that it deprives the state agencies of a meaningful deferral and is inconsistent with the language of 42 U.S.C. §2000(e)-5(c) & (e) which require that the State or local agency be one with authority to grant or seek relief from the alleged discriminatory practice. The elimination of the state filing requirement, as suggested by Respondent, has the effect of removing the authority placed in state agencies where their statutory creation restricts their activities to occurrences which are filed with them within certain time periods.[17]

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[17] Numerous courts have held that the state filing time limitations or the minimal federal filing limitations, whichever is longer, should be complied with in order to utilize the extended limitation period. Dubois v. Packard Bell Corp., 470

In Mohasco, this Court noted that there was nothing in the legislative history of Title VII to suggest that the complainants in some states were to be allowed to proceed with less diligence than those in other states. However, that is the rule that the Respondent is now urging upon the Court. An act of discrimination which occurred 200 days prior to filing a claim in a nondeferral state is untimely. However, that same occurrence, if filed with the state agency on the 200th day, is claimed to be timely

F.2d 973 (10th Cir. 1972) Doski v. M Goldseker Co., supra; Ewald v. Great Atlantic & Pacific Tea Co., 620 F.2d 1183 (6th Cir. 1980) (concerning age discrimination, 29 U.S.C. §626) Bonham v. Dresser Industries, Inc. supra., (dealt with age discrimination statutes); DeGideo v. Sperry- Univac Co., 415 F. Supp. 227 (E.D. Pa. 1976); Mobley v. Acme Markets, Inc., 473 F. Supp. 851 (D. Md. 1979); Bertsch v. Ford Motor Co., 415 F. Supp. 619 (E.D. Mich. 1976); Ugianski v. Flynn and Elrich Co., 337 F. Supp. 807 (D. Md. 1972) Ashworth v. Eastern Airlines, Inc., 389 F. Supp. 597 (E.D. Va. 1975); Williamson v. Chevron Research Co., 12 FEP Cases 96 (N.D. Cal. 1976).

despite the fact that the claimant has failed to comply with the state filing limitation or the minimal 180-day period required in a nondeferral state. Such a practice would be an empty meaningless gesture and a mere pretext to revive a stale claim. Additionally, Respondent's position requires a finding that Congress intended to impose upon all state agencies an expandable limitation period for processing discrimination claims of between 240 and 300 days despite the existance of state statutes.[18]

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[18] This interpretation does not comport with the following legislative history noted in Moore v. Sunbeam Corp., supra, 825 n. 35 which stated:

> "Section 706(d) establishes a 90-day period of limitations on the filing of a charge, with appropriate provisions to extend the period in the situation in which prior resort is had to a State agency. Moreover, §706(d) is carefully worded to protect an individual who, in good faith, unnecessarily seeks to comply with the requirement of initial resort to state or local

Even if Respondent's position were accepted, the denial of tenure and offering of a terminal year contract occurred more than 300 days prior to Respondent's filing with the EEOC on April 28, 1975, since these occurrences transpired prior to July 2, 1974. Respondent asserts that he can avoid the timeliness problem by claiming that the statements received by Respondent on June 26, 1974 had the effect of tolling the filing requirements until he was advised of the outcome of his grievance. This argument runs counter to the reasoning of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), where, as here, all benefits of the status sought ceased when the decision was made and would not be accorded the employee unless he prevailed in the

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authority. Such a person will not lose his right to seek federal relief simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." Senator Humphry, Leg. Hist. at page 3006.

grievance procedure. The decision to deny tenure was made by the Board of Trustees on March 13, 1974 (Respondent's Brief 2). If this action were discriminatory, as claimed by Respondent, the time for filing a claim began on that date. Even if the Respondent's argument, that the letter of June 26, 1974, mislead the Respondent into thinking he could await the outcome of the grievance procedure were accepted, it is only from that date until he received such word that the 300-day period would be tolled. The period from the decision to deny tenure to the earliest filing on April 4, 1975, is still more than 300 days when the period from June 26 through September 12 is not counted.[19]

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[19] Cases considering tolling of the time limitations would not support the Respondent's contention under the facts of this case, Chappel v. Emco Mach. Works Co., 601 F.2d 1295 (5th Cir. 1979); Rudolph v. Wagner Elec. Corp., 586 F.2d 90 (8th Cir. 1978), reh. en banc den. (1978). Strozier v. General Motors Corp., 442 F. Supp. 475 (N.D. Ga. 1977), Wood v. Southwestern

CONCLUSION

For the reasons stated herein and in the Petitioners' Opening Brief, the judgment of the Court of Appeals, insofar as it reversed the dismissal of the Complaint against the Petitioners should be reversed.

Respectfully submitted,

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Bell Telephone Co., 422 F. Supp. 41 (E.D. Mo. 1977) reversed and remanded on other grounds 580 F.2d 339 (8th Cir. 1978), cf. Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980).

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On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners,

v.

COLUMBUS B. RICKS,
Respondent

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

INTEREST OF AMICUS

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in universities and colleges. Since its inception, the Association has formulated Statements, frequently in concert with other national organizations, intended to establish minimum standards of institutional practice in higher education. Paramount among these is the *1940 Statement of Principles on Academic Freedom and Tenure* (1940 Statement), drafted jointly with the Association of American Colleges (AAC) and currently endorsed by over 100 educational organizations and learned societies. To a large extent, Association standards are recognized

and relied on by faculties, administrations, and governing boards in institutions of higher education.

The instant case concerns the procedures used within a college or university in the nonrenewal of a nontenured faculty member. National norms concerning termination procedures have been offered in the joint AAC-AAUP *Statement on Procedural Standards in Faculty Dismissal Proceedings* and in the AAUP's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments.* Also of relevance is the *Statement on Government of Colleges and Universities,* authored jointly by the AAUP, the American Council on Education and the Association of Governing Boards of Universities and Colleges. The latter Statement sets forth the nature of shared responsibility and cooperative action among the components of the academic institutions. *Amicus* AAUP intends to apprise the court of the nature of the decision-making in higher education, and to suggest the consequences that ought to flow from it in response to the question of timely filing of Title VII claims.

As an organization deeply interested in the academic employment relationship and as an organization actively involved in the mediation of disputes between professors and their institutions, the Association believes it is uniquely situated to address this Court as *amicus curiae* in the present litigation, which is concerned with when a professor must seek remedies through the administration or judicial systems rather than within the academic community.

FACTS AND PROCEDURAL HISTORY

Professor Columbus B. Hicks, a black male Liberian, was appointed to the faculty of Delaware State College beginning in September of 1970. He served as Professor of Education and Coordinator of Science Education. His was a probationary, non-tenured position with renewable year-to-year contracts. In February, 1973, the College's

faculty Committee on Promotions and Tenure considered and denied Ricks tenure. He was offered another one-year contract and informed that he would be reconsidered for tenure during the following year. In February, 1974, the Committee on Promotions and Tenure again considered Ricks for tenure and recommended that he not be awarded tenure. The Committee also recommended that Ricks should be offered a terminal-year contract in accordance with school policy. The Board of Trustees of the College met on March 13, 1974, and accepted the recommendation of the Committee.

A series of internal grievances and requests for review were subsequently pursued by Ricks. In late March, 1974, Ricks petitioned the President of the College to reconsider the denial of tenure. The President refused to reconsider. Ricks also petitioned the Board of Trustees for a hearing on the denial of tenure. In April, 1974, the Board confirmed the denial of tenure. In May, 1974, a post-denial of tenure hearing was held by the Board's Education Policy Committee. This Committee determined that the denial of tenure was proper. In June, 1974, the Board notified Ricks of his terminal contract which would expire on June 30, 1975. In September of Ricks' terminal academic year the Board again notified him that it would not reverse the tenure denial decision of February, 1974. On April 4, 1975, Ricks filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). Ricks' employment with the College ended on June 30, 1975.

The EEOC issued a right-to-sue letter to Ricks on July 6, 1977. On September 9, 1977, he filed a six-count complaint which alleged, inter alia, discrimination in violation of Title VII and § 1981. The District Court dismissed all claims, ruling that the Title VII claim was not filed within 180 days after the alleged unlawful employment practice occurred as required by 42 U.S.C.

§ 2000e-5(e). The § 1981 claim was barred by the applicable statute of limitations. On appeal, Ricks challenged the dismissal of the Title VII and § 1981 claims. The United States Court of Appeals for the Third Circuit held that both the 180-day time requirement of 42 U.S.C. § 2000e-5(e) and the applicable 42 U.S.C.A. § 1981 statute of limitations began to run on the date the terminal year contract expired. This Court granted certiorari on February 15, 1980.

ISSUE PRESENTED

Whether, in the case of the nonrenewal of a nontenured college professor, the Title VII 180-day filing requirement and the appropriate § 1981 statute of limitation begin to run on the date of actual termination of employment.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit is correct in holding that the 180-day filing period required by 42 U.S.C. § 2000e-5(e) does not begin to run until the employee knows, or a reasonable person should know, that the employer has made a final decision to terminate his employment, and the employee ceases to render further services to the employer.

It is the position of *amicus* AAUP that the protection of the autonomy of the decisionmaking and review procedures of institutions of higher education requires starting the 180-day time period on the date a faculty member's employment relationship with his or her academic institution ends. Policies and procedures that control the termination of the academic employment relationship traditionally attach great significance to internal decision and review procedures that call for multi-faceted collegial decisionmaking and opportunity for review following initial negative personnel decisions. Notice of a negative

tenure decision, if contested, triggers this review process. By viewing the last day of employment as the date the 180-day period begins to run, this court can reinforce the policy of judicial deference to these internal goverance mechanisms without abdicating oversight of possible unlawful behavior.

During the terminal period of employment following an adverse tenure decision, a faculty member's relationship to the academic institution remains unchanged. It is at the end of the period of employment that the important change in status that is relevant to the running of the 180-day filing requirement takes place. To hold otherwise, by requiring a mandatory pursuit of a Title VII claim before the end of employment, would call for an expenditure of time and energy at the expense of one's teaching, research and university service. By starting the period only at the end of the employment, the Court would recognize the nature of a faculty member's status during a terminal period of employment and thereby increase the possibility of internal resolution without harm to the defendant university and decrease the probability of litigation. In addition, there would be a specific date known to all parties from which the 180-day period would run.

Because the 180-day period is treated as a statute of limitation, the filing period can be tolled until the last day of employment even if the court looks to an earlier date than the end of employment as the relevant time for the running of the 180-day period. The possibility of a modification of a decision through the internal review mechanism, and the continued academic responsibilities of a faculty member during a terminal appointment, justify tolling of the statute of limitations. Furthermore, the policy of protecting defendants from stale claims is not subverted by a tolling of the time period, and the humane and remedial policy behind the Civil Rights Act of 1964 would be enhanced.

ARGUMENT

I. The Court Of Appeals For The Third Circuit Was Correct In Holding That The 180-Day Time Period For The Filing Of Title VII Claims By College Professors Begins To Run On The Last Day Of Employment.

A. *The Third Circuit's Holding Protects Institutional Autonomy And Facilitates Judicial Review.*

This court and others, in numerous cases, have given deference to the internal decisionmaking procedures of colleges and universities. *N.L.R.B.* v. *Yeshiva University*, —— U.S. ——, 63 L. Ed. 2d 115 (1980); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978); *Kunda* v. *Muhlenberg College*, No. 79-1135 (3rd Cir., filed Feb. 19, 1980); *Powell* v. *Syracuse University*, 580 F.2d 1150 (2nd Cir. 1978). The American Association of University Professors (AAUP) in its 65-year history has played a central role in the development and promulgation of widely accepted standards and procedures that provide the foundation for decisionmaking in the academic community. These standards and procedures emphasize the importance of institutional review as a means of dispute resolution. Preliminary reliance on institutional review before the termination of employment is particularly appropriate in Title VII cases, where the review may determine the existence and cure the effects of discriminatory practices.

Joint and multileveled decisionmaking characterize the prevailing academic employment practices in American higher education. The national Commission on Academic Tenure in Higher Education, which was jointly sponsored by the AAUP and the Association of American Colleges, and whose composition included faculty members, college presidents, and trustees, explained:

> In the academic profession, as in other professions, it is the professionals (the faculty, led by its tenured

> members) who decide on admission to the profession, on fitness to continue, and on advancement through the professional reward system. Within the institution, the faculty, acting directly or through its representatives, makes the crucial decisions or recommendations concerning appointment, reappointment, and award of tenure, and concerning salaries, promotions, and other emoluments. This is the prevailing situation in higher education, even though legal authority is exercised by governing boards, usually on the basis of recommendation by college and university presidents. *Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education* 24 (1973).

The *Statement on Government of Colleges and Universities* provides that decisions on faculty status are the primary responsibility of faculty, subject to review by the chief academic officers with the concurrence of the Board. *AAUP Policy Documents and Reports* 40, 43 (1977 ed.).[1]

The existence of such a multifaceted decisionmaking process has the salutory effect of allowing for maximum flexibility in academic personnel decisions. Because of the possibility for review of decisions at various levels and because of the possibility of changed circumstances, notification of a decision is not necessarily final. The status of a college faculty member who has received notice of nonreappointment may change before the expiration of his or her contract for many reasons. For example, another position may become available, a college's financial situation may improve, or the faculty member may offer new evidence which would justify a

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[1] This *Statement* was drafted jointly in 1966 by the American Council on Education (ACE), The Association of Governing Boards of Universities and Colleges (AGB), and the American Association of University Professors (AAUP), that is, the three leading national organizations of institutions and institutional associations, governing boards, and faculty.

change in the prior negative evaluation. Of particular relevance in the context of the instant case, the existence of multiple review mechanisms always keeps open the possibility of "curing" an alleged procedural or substantive wrong in the decisionmaking process. These facts of academic life support the claim that for purposes of the 180-day period the final decision on reappointment or tenure refers to the expiration of the faculty member's appointment, and not to the date on which some person or body decides that the appointment will expire on that future date.

An understanding of the nature of decisions on renewal or nonrenewal of an academic appointment makes reasonable the claim that the 180-day period should run from the date the contract actually expires. The purpose of issuing notice of the decision at an early date is twofold: to provide adequate time for the faculty member to secure a suitable new position and, if the decision is challenged, to provide full opportunity for review through the college's internal mechanisms. Notice of a negative tenure decision that is contested serves as the starting point for institutional review.

The basic principles governing probation and continuous tenure for faculty appointments at American colleges and universities are enunciated in the *1940 Statement of Principles on Academic Freedom and Tenure*. This document, jointly authored by the American Association of University Professors and the Association of American Colleges and endorsed by over 100 educational organizations and learned societies, is widely accepted as the norm of the academic community.[2] It states

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[2] Courts have also recognized the normative role played by the 1940 *Statement*. For example, the Court of Appeals for the District of Columbia concluded that the *1940 Statement* represents "widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent

that "during the probationary period a teacher should have the academic freedom that all other members of the faculty have," and it provides that "notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period."

In order to provide a suitable procedure within a college or university for dealing with a probationary faculty member's allegation that a decision to issue notice of nonretention was based on considerations violative of academic freedom, in 1956 the AAUP formulated procedural standards calling for a hearing before a faculty committee, with the burden of proof resting on the probationer but with the administration of the institution required to come forward with evidence in rebuttal if a *prima facie* case of violation of academic freedom is made.[3] These standards, subsequently amplified and made

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college administrators and governing boards." *Browzin* v. *Catholic University of America*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975). *Accord*, *Krotkoff* v. *Goucher College*, 585 F.2d 675 (4th Cir. 1978); *Drans* v. *Providence College*, 383 A.2d 1033, 1040 (R.I. 1978). Similarly, the Equal Employment Opportunity Commission, in promulgating final interpretations of the 1978 amendments to the Age Discrimination in Employment Act, incorporated the 1940 *Statement* to define the minimum standards for tenure. According to the Commission: "While tenure policies and practices vary greatly from one institution to another, the minimum standards set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement." 44 *Federal Register*, No. 226, 66791, 66799 (November 21, 1979).

[3] See *Academic Freedom and Tenure in the Quest for National Security*, *AAUP Bulletin* 54 (1956), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 29 (1977).

applicable to allegations of improper discrimination as well as violations of academic freedom, are set forth in the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure*, most recently revised in 1976.[4] In addition, AAUP has issued a more comprehensive *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (1971),[5] providing norms of academic due process for contested cases of nonreappointment and explaining the distinctions between nonreappointment and dismissal prior to the expiration of an appointment. This Court, in the course of declining to interpret the Fourteenth Amendment as itself requiring certain procedures promulgated by the AAUP and adopted by many colleges and universities, nevertheless singled out these standards for recognition. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) at 578-79 and n.17.

In cases of notice of intention not to reappoint where academic freedom or discrimination is at issue, the procedures cited above and reflected in the internal regulations of hundreds of colleges and universities call first for preliminary consideration by a faculty committee which will seek to settle the matter by informal methods. Failing settlement, and if that committee so recommends, the case then goes before a faculty hearing committee which follows a formal adjudicative procedure. Representation by counsel is permitted, a verbatim record is kept, and witnesses can be cross-examined. The contesting faculty member is responsible for stating the grounds for his or her allegations and carrying the burden of proof, but upon establishment of a *prima facie* case it is incumbent upon those who decided to issue notice of nonreappointment to offer evidence supportive of their decision. The

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[4] AAUP POLICY DOCUMENTS AND REPORTS at 15.

[5] AAUP POLICY DOCUMENTS AND REPORTS at 8.

findings and recommendations of the faculty hearing committee are transmitted to the institution's governing board, which is responsible for the final decision and to which appeal may be made.[6]

This procedure is necessarily time-consuming, often taking the better part of the terminal year following the issuance of notice and before the expiration of the term of appointment. Often time elapses while mediative efforts are undertaken, most frequently at the beginning of the process but on numerous occasions at later stages. This mediative work is undertaken by appropriate academic officers and bodies within the institution and, when appropriate and feasible, by local chapters of the AAUP or by the AAUP's national staff. The AAUP staff responds annually to approximately 300 cases of contested notice of nonreappointment, and in about 100 of these cases goes beyond offering advice to the parties and assumes an active mediative role.[7] AAUP staff members, and AAUP legal counsel when consulted by attorneys representing faculty members, advise that whenever feasible internal institutional procedures, informal and formal, be employed before resorting to an official complaint to a governmental administrative agency or to litigation in the courts. Over half of the cases mediated by the AAUP end in a mutually acceptable resolution, more often than not involving rescission or modification

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[6] See Recommended Institutional Regulation 10 in AAUP POLICY DOCUMENTS AND REPORTS at 20-21.

[7] See Davis, *Principles and Cases: the Mediative Work of the AAUP*, 58 *AAUP Bulletin* 169 (1970). See also R. HOFSTADTER & W. METGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 490-95 (1955); DEVELOPMENTS IN THE LAW—ACADEMIC FREEDOM, 81 Harv. L. Rev. 1045, 1105-1112 (1968); *On Processing Complaints of Discrimination on the Basis of Sex*, 63 *AAUP Bulletin* 231, 234-36 (1977).

of the original notice of nonreappointment. Selected serious cases that remain unresolved despite the AAUP's mediative efforts go to a formal investigation by an *ad hoc* committee of expert professors from other institutions, leading to a published report. Most of these investigated cases end in an acceptable resolution as well, sometimes before a report is published and sometimes afterwards.[8]

In some cases, of course, internal procedures for review are inadequate or nonexistent, mediative attempts are rebuffed, and the faculty member issued notice of nonreappointment knows well within 180 days after receiving the notice that to pursue a complaint of unlawful discrimination he or she has no alternative to filing charges under 42 U.S.C. The extensive cumulative experience of AAUP testifies, however, that in the preponderance of serious complaints internal procedures and informal mediative efforts are not exhausted within 180 days, that typically most or all of the twelve months of remaining post-notice appointment are consumed. To require the filing of 42 U.S.C. charges within 180 days after receipt of notice would in these cases require waiving or aborting internal institutional procedures and mediative endeavors, weakening the opportunities of academic institutions for effective self-regulation, weakening institutional autonomy, and unnecessarily adding to the load of applicable governmental agencies and the courts.

An affirmation of the Third Circuit decision in this case would reinforce the policy of judicial deference to

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[8] For an example of the latter, see *Academic Freedom and Tenure: University of Hawaii*, 51 *AAUP Bulletin* 29 (1969), and *Report of Committee A*, 1968-69, 57 *AAUP Bulletin* 170 (1969), for a case in which AAUP mediative efforts combined with an internal hearing led to rescission of notice of nonreappointment and conferral of continuing tenure.

the internal governance mechanisms of an academic institution without tolerating unlawful behavior or abdicating judicial responsibility. It is after the academic appointment expires, that is, after the internal collegial decisionmaking procedures have run their course, that the external intervention of administrative and judicial bodies is most appropriate. In recent years there has developed a judicial recognition of the nature of academic decisionmaking and review procedures. See Edwards, H., HIGHER EDUCATION & THE LAW 14 (1979). This recognition combines a deference to academic review tempered by the unwillingness to allow discrimination to persist. "Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure." *Kunda* v. *Muhlenberg College*, Slip. Op. at 31 (3d Cir. 1980). It is the court's task to "steer a careful course between excessive intervention in the affairs of the university and unwarranted tolerance of unlawful behavior." *Powell* v. *Syracuse University*, 580 F.2d 1150, 1154 (2nd Cir. 1978). One way in which courts have steered this course in cases involving nonreappointment or denial of continuous tenure is to view the decision against further appointment as subject to modification prior to the date the existing contract expires. *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002 (W.D. Pa. 1973). Given the nature of decisionmaking in colleges and universities, the possibility of such modifications commonly exists. If the decision of the Third Circuit in the instant case is reversed, the staff of the AAUP would be forced to advise hundreds of complainants every year that, in order to protect their legal rights, they must initiate legal action before utilizing the internal procedures which have been carefully developed and refined, and broadly applied, throughout the academic community.

B. *A Faculty Member's Relationship With His Institution Does Not Change After A Denial Of Reappointment Or Tenure.*

A faculty member retains all rights of academic citizenship between notification of nonreappointment and the expiration of his contract of terminal appointment. The last date of appointment, therefore, should mark the date the 180-day period begins to run. Nothing in either of the cases primarily relied upon by petitioner and *amicus* Equal Employment Advisory Council suggests otherwise. *United Air Lines* v. *Evans*, 431 U.S. 553 (1977) and *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). Indeed, neither case even addresses the applicability of the 180-day limit to an employee who completes a terminal contract after a decision not to reappoint. *Evans* is concerned with the seniority of a plaintiff who had been terminated and rehired after several years had intervened. *Electrical Workers* involves the filing of a grievance under a collective bargaining agreement *after* the contract for employment had ended. The relevant statutory occurrence, the court said in *Evans*, was the day the employee was fired: "she stopped work and ceased receiving pay and benefits as of that date." *Id.* at 234. *Electrical Workers* stands for the proposition that the 180-day period begins to run when the date of notice and act of termination coincide. See *Krzyzewsky* v. *Metropolitan Government*, 584 F.2d 802, 806 (6th Cir. 1978). *Electrical Workers* does not address the issue of the status and rights of an employee who, after receiving notice of termination, continues to maintain full employment status for an extended period before actual termination. Unlike many personnel decisions in other sectors of employment, there is no immediate effect of a negative tenure decision on the current contract of employment of an untenured faculty member. There is no immediate severing of the working

relationship a faculty member has with his or her institution, as is ordinarily the case in dismissal. Indeed, according to the 1940 *Statement*, a professor must be offered a one-year terminal contract after a negative tenure decision. During this terminal contract, the professor continues to teach and continues to participate in advising, research, university committee work, and other activities performed by both tenured and probationary colleagues. The professor's relationship with the institution ends when the contract of terminal appointment expires.

Outside of the academic context, cases involving actual termination some time after notification of termination have been distinguished from situations where termination coincides with notification. For example, in a case where an employee was terminated and given two weeks of holiday pay, the Sixth Circuit emphasized: "This case is clearly different from one where a person with a contract of employment is notified that she will be terminated when her contract expires in the future. Under such circumstances, it is reasonable to make the date of actual termination rather than the date of notice the starting point for the 180-day statutory period." *Krzyzewsky* v. *Metropolitan Government*, 584 F.2d 802, 806 (6th Cir. 1978). The *Krzyzewsky* principle ought to apply *a fortiori* to academic employment. The Second Circuit has held that when a university professor received notice of nonrenewal on May 15, 1972, and the employment contract ended in June, 1973, the discharge was consummated only when the professor left the university. *Egelston* v. *State University at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976). Likewise, in a case where tenure was denied on May 5, 1972, a federal district court, following *Egelston*, held that the end of the terminal year contract, or at the very least, the time a faculty member received word that the president of the university had reaffirmed the decision to give a terminal year contract, was the date from which

the time period runs. *Cap* v. *Lehigh University*, 433 F. Supp. 1275 (E.D. Pa. 1977).[9]

The mandatory pursuit of a Title VII complaint before the end of a faculty member's employment would call for the expenditure of time, energy, and perhaps money to the potential detriment of one's teaching, research, and university service.[10] If the period of statutory limitations were not to begin until the last day of employment, a professor would be encouraged to resolve the matter internally, without hasty and potentially unnecessary recourse to administrative or judicial bodies. Should the need to file a complaint remain at the end of employment, the later actions in the EEOC or in court would benefit from the potentially better record that would probably be created by the complaint having first been processed within the academic system. Finally, as the Third Circuit pointed out, making the last day of employment the ap-

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[9] Even *Abramson* v. *University of Hawaii*, 594 F.2d 202 (9th Cir. 1979), the case most heavily relied upon by petitioner, does not stand for the view that the date of notice of denial of tenure is the date from which a 180-day time period should run. "[W]hen requests for reconsideration are an ordinary and generally accepted part of the tenure decision process the presidential refusal to overturn a departmental denial of tenure can be considered *the* final denial of tenure." *id.* at 209. Thus, the final denial might not be viewed as the issuance of notice if additional institutional review were possible. The Ninth Circuit, therefore, remanded the case to see if such review was an accepted part of the tenure process. The *Abramson* court not only does not state that the date of notice begins the running of the time period, it also recognizes the significance of the internal review procedures in such matters.

[10] *Amicus* AAUP agrees with the Third Circuit that an aggrieved professor might want to file earlier. Such earlier filing ought to be permissive, not mandatory. *Delaware State College* v. *Ricks*, 605 F.2d at 713.

propriate day from which to mark the time period gives a "bright line guide" to the EEOC, the courts, and the parties. *Delaware State College* v. *Ricks*, 605 F.2d at 712-13. The college would be on notice that any potential Title VII claim would have to be made no later than 180 days after the term of employment ends.

II. Even If The 180-Day Time Period Is Held Not To Run From The Date Of The Expiration Of A Terminal Contract, The Running Of The Period Ought To Be Tolled Until That Date.

The 180-day time period ought to be looked upon as a statute of limitations and hence subject to equitable tolling. Therefore, even if the statutory time period begins to run before the date employment ends, the running of the limitation period ought to be tolled until that date. As the Fifth Circuit pointed out:

> The *ratio decidendi*, . . ., of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here. The Act contemplates that complaints initiating EEOC proceedings will be brought in the first instance by laymen. It is reasonable, therefore, for courts to refuse to apply technical rules of common law pleading to charges filed initially with the Commission . . . and, of course, remedial legislation such as Title VII of the Civil Rights Act of 1964 is entitled to the benefit of liberal construction. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975).

Tolling a statute of limitations has been viewed as appropriate when it effectuates the Congressional purpose

behind the entire statute. "The basic question to be answered in determining whether, under a given set of facts, a statute of limitation is to be tolled, is one of legislative intent whether the right shall be enforcible after the prescribed time." *Burnett* v. *New York Central RR Co.*, 380 U.S. 424, 426 (1965). The policy behind statutes of limitation supports the view that the Title VII 180-day time period can be tolled until the termination of employment. As this Court recently stated:

> Statutes of limitation, which 'are found and approved in all systems of enlightened jurisprudence' . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free from stale claims in time come to prevail over the right to prosecute them.' These enactments are statutes of repose, and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of documents, or otherwise. *United States* v. *Kubrick*, —— U.S. ——, 62 L.Ed. 2d 259, 266 (1979).

Given that the Civil Rights Act of 1964 is a humane and remedial Act which promotes accommodation, the Congressional purpose behind Title VII time limitations has been stated as follows:

> The procedures thus mandated exist not for their own sake, but rather, in the furtherance of substantive purposes: the promotion of dispute resolution through accommodation rather than litigation, . . . and the expeditious handling of complaints, . . . Therefore, although compliance with these requirements is a jurisdictional prerequisite to maintenance of a civil action . . . the rigid insistence on meticulous observance of technicalities unrelated to any substantive purpose is inappropriate. *Weise* v. *Syracuse University*, 522 F.2d 397 (2nd Cir. 1975).

Numerous courts have held that there are circumstances in which it is appropriate to interrupt or delay the section 2000e-5(e) time period for filing a complaint beyond the specified date of the alleged unlawful activity. Tolling may be justified during the pendancy of an action before a state court which had jurisdiction over the subject matter of the suit, but which was the wrong forum under state law. The running of the 180-day period might justifiably be deferred until the claimant knew or should have known the facts which would give rise to his or her Title VII claim. Tolling may be appropriate when the EEOC misleads a complainant about the nature of his or her rights under Title VII. *Chappell* v. *Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979). Where the policies of the Civil Rights Act are effectuated and where there is no harm done to the defendant, the tolling policy ought to be applied in the case of a faculty member who has been issued notice of nonreappointment, whose academic status will not change during the period of the terminal contract, and who has available avenues of institutional review of the adverse decision.

It should be observed that the 180-day period is an extremely short period in the range of statutes of limitations. It could not be contended that if the running of the 180-day period were to begin on the date when employment ceases, witnesses' memories would have faded, documentary evidence would have become unavailable, or that the institution's ability to defend would be significantly prejudiced. Few claims grow stale in 180 days. None of the purposes underlying statutes of limitations would be impaired; on the contrary, it is more likely that a full ripe record will support adjudication of a claim that has become mature upon termination of employment.

In the case of the academic employment relationship, because of the possibility of a modification in a negative decision up until the time of the expiration of the contract, and because of the change of status that might

result from a mandatory filing while one still enjoys all of the prerogatives of an academic position, equitable tolling of the limitation period is justified. Furthermore, none of the defendant's rights protected by a statute of limitations are in jeopardy if the 180-day period runs from the date of expiration of the employment contract. The defendant college is on notice that it might have a Title VII claims filed against it within 180 days after a professor's employment ceases. There is a time certain known by all parties after which no claim can be filed. There is the opportunity for accommodation through widely accepted procedures for review of the decision against retention. And finally, rather than a likely loss of evidence, there is a greater likelihood that during the period between notice of termination and actual termination internal review procedures will produce a superior record to that which would exist were the complainant to go outside the academic system earlier. Therefore, even with the later filing date, the 180-day period fulfills the purpose for which it is designed, and the substantive policy of dispute resolution is enhanced.

CONCLUSION

For the reasons outlined in this brief, *amicus curiae* AAUP respectfully urges that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners,

v.

COLUMBUS B. RICKS,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of

sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court which involved specifically the interpretation of its filing requirement, 42 U.S.C. § 2000e-5(e) (hereinafter "section 706(e)"), the statutory provision of primary concern here. See *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). *See also, California Brewers Association* v. *Bryant*, 22 FEP Cases 1 (U.S. Feb. 20, 1980); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Mohasco Corp.* v. *Silver*, —— U.S. ——, No. 79-616; *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977); and *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

SUMMARY OF ARGUMENT

The Amicus submits that the Third Circuit's ruling that the plaintiff complied with Section 706(e) of Title VII, which requires as a prelude to suit that a charge be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act, is directly contrary to this Court's ruling in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). *Evans* holds that a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed . . . , an unfortunate event in history which has no present legal consequences." *Id.* at 558. "Mere continuity," this Court declared, is legally insignificant absent a "present *violation*." *Id.* (Emphasis in original.)

There is no allegation in the record before this Court of an act of discrimination occurring within 180 days of the plaintiff filing his charge. The act complained of, the denial of tenure accompanied by a terminal one-year contract, occurred ten months before his filing, and thus his action is time-barred. The Third Circuit's attempt to distinguish and limit *Evans* as applicable only to cases where a plaintiff has been terminated from employment for more than 180 days has no basis in the language or logic of this Court's decision. At the same time, the circuit court's formulation of a "continuing violation" theory to preserve all claims of employment discrimination arising during the employment relationship until 180 days after termination distorts Title VII's time limitation period beyond recognition and insures the proliferation of stale claims in the federal courts.

Inherent in the Third Circuit's misconstruction of Title VII's time limitation is a perpetuation theory wholly at odds with the Title VII policy that favors limiting the life of claims. Virtually all forms of alleged employment discrimination, if proven, have a consequential, and to that extent, continuing impact on their victims. Indeed, were plaintiff's claims proved, he might well be able to show his denial of tenure has resulted and will continue to result in consequences to his career extending for years. But the teaching of this Court's decision in *Evans* and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), unequivocally establishes that continuing impact alone does not insulate alleged acts of discrimination from the necessity for timely challenge. By allowing plaintiff's claim of unlawful discrimination on the basis of tenure denial to languish until his complete termination from employment, the Third Circuit not only resurrects "continuing impact" as a determinant for extending the life of claims, but does so arbitrarily by basing actionability for remote discriminatory acts on the continuing employment relation between the parties, a notion that would render nugatory the limitations period for filing.

The Third Circuit defended its use of the employment termination date as calculated to reduce the possibility of litigation by giving persons "in academia as well as in the business community" an opportunity to change their minds about employment-related decisions. But disregarding the clear import of Section 706(e) and casting aside the well-established precedent of this Court should not be excused

on such novel, and speculative grounds. This Court has indicated that the time limitation requirement in Title VII constitutes nothing less than a jurisdictional prerequisite to filing suit and has admonished that courts lack power to alter the filing period by deferral to other remedies. *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). In any event, the circuit court's policy, if left intact, would foster the litigation of stale claims by giving an employee a "blank check" to bring suit on a discrete act of alleged discrimination perhaps years after the event, so long as he remains in the employ of his prospective defendant. Such a policy would encourage speedy employee discharges rather than facilitate the expeditious resolution of Title VII claims, which is the purpose behind the time limitation requirement.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING A REMOTE ALLEGED DISCRIMINATORY ACT ACTIONABLE UNDER TITLE VII SOLELY ON THE BASIS OF A CONTINUING EMPLOYMENT RELATIONSHIP BETWEEN THE PARTIES

The district court made a finding below that plaintiff's Title VII claim is based on the decision of the defendant denying him tenure and awarding him a one-year contract during the spring of 1974[1]—a finding that was left undisturbed in the

[1] "I conclude," stated the district court, "that the alleged violation occurred when the Board of Trustees denied the plaintiff tenure and awarded him a terminal contract." Cert. Pet. at 30a. "At oral argument," noted the court, "plaintiff's counsel made it clear that the only acts upon which the plain-

court of appeals. Furthermore, it is uncontested on the record before the Court that plaintiff did not file his charge with EEOC until approximately ten months after the decision denying him tenure, well after the 180-day limit for filing a Title VII-based charge with the EEOC had expired.[2] Nevertheless, the court of appeals reversed the district court's dismissal of plaintiff's claim on the basis that the 180-day period for filing a Title VII charge does not begin to run "until the employer has made a final decision to terminate [the employee], *and the em-*

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tiff relies to bring his case within the statutory period are those relating to the denial of tenure and the termination of his employment." Cert. Pet. at 28a.

[2] The applicable statutory provision reads:

> A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charges are made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the state or local agency. 42 U.S.C. § 2000e-5(e) (1976).

The failure to comply with state filing requirements is not in issue here.

ployee ceases to render further services to the employer." (Emphasis in original.) The Amicus submits that the court of appeals' interpretation of the time limitation requirement in Title VII squarely contravenes the Court's decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), as well as the thrust of the Court's reasoning in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

In *Evans*, it will be recalled, the plaintiff, a female flight attendant, filed a sex discrimination claim grounded upon the employer's unwillingness to credit her with seniority accumulated between 1968, when she was terminated pursuant to a policy (subsequently declared unlawful) against marriages, and 1972, when she was hired as a new employee. In arguing that the employer had engaged in a continuing violation of Title VII, plaintiff contended that the seniority system gave present effect to the employer's past unlawful act. The Court rejected this contention on the basis that plaintiff's claim, not having been filed within the time prescribed by the statute, was stale. Thus, the Court explained:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558.

The Court then addressed specifically plaintiff's allegation of a continuing violation: "[Plaintiff] emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.* (emphasis in original). By these words, the Court acknowledged that both remote and current acts of discrimination can have an effect on a discriminatee, but that only charges filed within 180 days of the alleged discriminatory act can support a timely claim.

The Court's analysis in *Evans* of "continuing impact" and its recognition of the inappropriateness of relying upon such impact to measure timely filing under Title VII are directly on point with the facts of this case.[3] The acts alleged here by the plaintiff to be

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[3] The facts of the instant case may present even more compelling reasons for rejecting the continuing violation theory than did *Evans*. Thus, while both cases concern charges of individual discrimination, *Evans* also involved a company policy that as a matter of law had been found discriminatory, *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Since *Evans* would hold nonactionable a company *policy* of discrimination that has been discontinued more than 180 days before the filing of a charge, this only underscores the remoteness of the isolated alleged discriminatory acts here. Whether *Evans* may still permit a timely filing on the basis that a defendant has committed a *remote* discriminatory *act* and maintains a *present* discriminatory *policy*, is not in issue here, for no discriminatory policy has been alleged. *Cf.*, *Goldman* v. *Sears*, 607 F.2d 1014, 1018 (1st Cir. 1979), *cert. denied*, 48 U.S.L.W. 3598 (U.S. March 18, 1980).

discriminatory occurred well over 180 days previous to his filing a charge. The *only* circumstance acknowledged by the court of appeals as extending the alleged violation is the existence of a continuing employment relation. Notwithstanding the circuit court's novel characterization of plaintiff's termination as "continuing," this is but another way of saying that the remote discriminatory act continues because the discriminatee is still employed—a notion indistinguishable from the continuity-of-effect theory rejected by the Court in *Evans*. *See also, Martin* v. *Georgia Pacific Co.*, 568 F.2d 58, 62 (8th Cir. 1977) (plaintiff's Title VII claim time-barred, per *Evans*, despite employee's current employment); *see generally*, Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 821-22 (1979).

Evans, of course, concerned the impact of a commercial seniority system, whereas here an academic tenure decision is involved. Through the enactment of a specific provision, Section 703(h), Congress sought to preserve employee's seniority expectations as embodied in various seniority systems. Because that section is limited neither to private businesses nor to seniority arrangements collectively bargained,[4]

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[4] The applicable statutory provision reads:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not

principles established under Section 703(h) may apply here. To the extent they do, the untimeliness of plaintiff's claim is that much more evident.

In *International Board of Teamsters* v. *United States*, 431 U.S. 324, 353-54 (1977), the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." Although the question of a timely filing was not raised, the Court declared that by "both the literal terms of § 703(h) and the legislative history of Title VII," Congress had "extended a measure of immunity" to systems that " 'operate to 'freeze' the status quo of prior discriminatory employment practices.' " *Id.* at 350. The Court thereby made clear that while both past and present acts can have present discriminatory effects, only present discriminatory effects are actionable. In the case at bar, plaintiff alleges, at most, a "past" discriminatory act which, even if it has present consequences, does not incorporate a

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the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 USC 206(d)).

42 U.S.C. § 2000e-2(h) (1976).

present discriminatory decision giving rise to present discriminatory effects which, under both *Teamsters* and *Evans*, is a *sine qua non* to a viable Title VII claim.

Whether or not principles associated with Section 703(h) come into play here, however, the Court's opinion in *Evans* makes plain that the requirement of a present violation is applicable to all Title VII suits and not only to those relating to seniority cases. This is manifest in that the Court addressed currently operated neutral *systems*, and did not even address Section 703(h) until after it had disposed of the case on the merits, stating subsequently that the section "provide[d] an additional ground for rejecting [plaintiff's] claim." 431 U.S. at 560. The Court thus made unequivocally clear that only discriminatory decisions currently rendered are actionable irrespective of the employment setting, and that so long as the employment system under review is not *presently* discriminating against the plaintiff, a remote discriminatory act constitutes nothing more than "an unfortunate event in history which has no present legal consequences." *Id.* at 558. Accordingly, the Ninth Circuit has followed the principles established in *Evans* by ruling, in the context of an academic tenure case, that the "proper focus" for determining timeliness of filing under Title VII "is upon the time of the discriminatory acts (*i.e.*, final tenure decision), not upon the time at which the consequences of the acts become most painful." [5]

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[5] *Abramson* v. *University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)

Cf., *Jacobs* v. *Board of Regents*, 21 FEP Cases 1656, 1659 (S.D. Fla. 1979) ("the discharge . . . of an employee is a

The court of appeals' holding that a continuing employment relation keeps alive what would otherwise be an untimely Title VII claim is contrary to the logic, as well as to the law of *Evans*. By measuring the 180-day time limit from the date of the alleged discriminatory act, all Title VII plaintiffs are placed on an equal footing. As commentators have pointed out, allowing for a continuing employment relationship to extend the time limit "could produce the anomalous result of granting relief to parties suffering less harm—putative promotees—while denying relief to parties suffering greater harm —putative hirees or dischargees." Jackson and Matheson, *supra*, 67 Geo. L.J. at 822. More fundamentally,

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discrete act of discrimination that does not rise to the level of continuing discrimination"). The reliance by the circuit court below upon case law in the Second Circuit purportedly in accord with its own view of "continuing violation" is misplaced. In *Egelston* v. *State Univ. College*, 535 F.2d 752 (2d Cir. 1976), the court found that plaintiff had alleged acts of sex discrimination within the 180-day filing period. Moreover, the plaintiff in that case alleged that the discrimination against her was not an isolated act, but constituted a part of the college's "continuing policy to deny women access to its upper echelons." *Id.* at 755. Whatever the viability of a "continuing violation" theory where present discrimination policies are alleged, *cf.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (proscribing employment practices "fair in form, but discriminatory in operation") no such allegation has been made here, and the circuit court below has eschewed any reliance upon the notion of a continuing discriminatory *policy* as perpetuating plaintiff's claim. See note 2, *supra*. Contrary to the Third Circuit's characterization of its sister circuit's case law, the Second Circuit in fact has been very strict in applying the 180-day filing requirement, terming it a "necessary prerequisite" to suit under Title VII, *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978).

since employment relations often exceed six months, "to base actionability on this theory would render the statutory filing requirement hollow in many cases." *Id. Accord, Cisson* v. *Lockheed-Georgia Co.*, 392 F. Supp. 1176, 1181 (N.D. Ga. 1975) (broad extentions of continuing violation theory might eliminate filing requirement entirely); *Gorden* v. *Baker Protective Services, Inc.*, 358 F. Supp. 867, 869 (N.D. Ill. 1973) ("If an alleged violation is deemed to be 'continuing' the statutory period is of little practical effect").

The court of appeals overlooks these glaring gaps in the logical structure of its rationale, choosing instead to concentrate solely on promoting a theory which, in its view, will encourage dispute settlement by permitting time for a reconsideration, and perhaps a reversal of potentially actionable employment decisions. The court of appeals thus surmises that "in academia as well as in the business community, decisions are often changed and it is not desirable to encourage the initiation of litigation that might thwart any internal processes of conciliation and reconsideration." 605 F.2d at 712. The court's reasoning, however, disregards the strong likelihood that such a policy, would, in fact, foster the litigation of stale claims. Free from the need to act in accordance with time restraints so long as there is no discharge, the circuit court's policy would give an employee a "blank check" to bring suit on a discrete act of alleged discrimination perhaps years after the event. Faced with uncertainty over the impact of its personnel policies and practices, employers hardly would be encouraged to seek settlement of disputes that, no matter how remote in time, could arise again in the form of a Title VII suit upon termination of

an employee. To the contrary, where disputes arose employers would be encouraged to terminate an employee as quickly as possible for fear that the employee might carry his cause of action with him throughout his employment.

These practical flaws in the circuit court's rationale can be traced to a fundamental error of law in the way it views the availability of alternative remedies for alleged employment discrimination. In framing a procedure the purpose of which is to allow other avenues of redress for employee complaints to operate without prejudicing the opportunity for subsequent filing of a claim pursuant to Title VII, the circuit court overlooks this Court's strict admonition that courts lack power to alter the congressionally established length of the filing period by deferral to independent remedies.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 52 (1974) (per curiam), the Court established that rights under a collective bargaining agreement and under Title VII "have legally independent origins and are equally available to the aggrieved employee." This principle of independent remedies was extended to separate statutory schemes in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), in which the Court held that the filing of a charge under Title VII does not toll the statute of limitations of an action, based on the same facts, brought under 42 U.S.C. § 1981.

This line of cases culminated in *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), in which an employee sought relief from allegedly discriminatory treatment through the grievance procedures of a collective bargaining agreement, but failed

to file a charge with the EEOC within what was then the 90-day time limit set forth in the statute. The Court viewed the independence of alternative remedies as so critical that it spoke of Title VII's filing requirement in jurisdictional terms, thereby expressing disfavor with notions even of equitable tolling:

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47, ... Congress did not leave to courts the decision as to which delays might or might not be 'slight.'

429 U.S. at 240. *See also, McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973) (filing timely charge of employment discrimination with EEOC a "jurisdictional prerequisite" to federal action).

In accordance with these views, the district court in *Evans* dismissed the plaintiff's complaint on the ground that it had no jurisdiction of a time-barred claim, a ruling which this Court noted specifically in its opinion in *Evans*. See 431 U.S. at 556, n.8.

The opinion of the circuit court stands in stark contrast to this Court's emphasis upon the independence of alternative remedies to employment discrimination, and the significance placed upon the strict time limits for filing under Title VII. Oblivious to the likelihood of unfair surprise and the revival of stale claims which its ruling would promote, the

court of appeals fashioned a rule which would preserve causes of action under Title VII far beyond six months and well into a future where evidence has been lost, memories have faded, and witnesses have disappeared.

As the right to be free of stale claims must ultimately prevail over the right to prosecute them, *Order of R. R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), so the court of appeals' continuing employment relation test must be struck down as virtually eliminating the limitations period for filing and inevitably exposing defendants to the assertion of stale claims.[6]

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[6] In contrast to the circuit court's opinion below, other federal courts have acknowledged that the time requirements set by Congress are designed to safeguard defendants, as well as agencies and courts, from stale claims. See *Gautam* v. *First National City Bank*, 425 F. Supp 579, 585 (S.D. N.Y. 1976), *aff'd mem.*, 575 F.2d 1290 (2d Cir. 1977); *see also, Loo* v. *Gerarge*, 374 F. Supp. 1338, 1340 (D. Hawaii 1974) (isolated and completed acts against a particular subjective viewpoint of the aggrieved "do not give the Plaintiff a perpetual right to file charges before the EEOC."); *Hickman* v. *Queen*, 15 FEP Cases 953, 955 (S.D. Ohio 1976).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that plaintiffs' claims are time-barred and that the judgment of the court of appeals should be reversed with instructions to reinstate the district court's order of dismissal.[7]

Respectfully submitted,

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[7] For the reason set forth in our main Argument, the Amicus further submits that the court of appeals erred in determining that the statute of limitations for purposes of 42 U.S.C. § 1981 did not begin to run until plaintiffs' employment ceased. Therefore, if the question of timeliness under Section 1981 is reached by the Court, that ruling must be struck down in order to avoid conflicts between Title VII and Section 1981. *Chance* v. *Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Waters* v. *Wisconsin Steel Workers*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

The Court, however, may not wish to reach the Section 1981 timeliness issue, as the district court below did not rule on whether plaintiff's national origin discrimination claim is cognizable under Section 1981, and the court of appeals did not address the issue of cognizability, leaving it to the district court on remand to make a determination on this issue. In any event, it is doubtful whether a claim of national origin discrimination is cognizable under § 1981. *See e.g.*, *Kurlyas* v. *U.S. Dep't of Agriculture*, 373 F. Supp. 1972 (D.D.C. 1974), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975). *Cf. Manzanares* v. *Safeway Stores*, 19 FEP Cases 191, 192-93 (10th Cir. 1979).

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v.

COLUMBUS B. RICKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether, in a case in which a college faculty member alleges that he was discriminated against on the basis of national origin in connection with his discharge from employment, the limitations period for filing a charge under Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), runs from the date on which he was actually discharged or from some earlier date on which the college notified him that it had decided to deny him tenure and to terminate his employment.

II

2. If the limitations period in this case began to run from the date of the petitioners' final decision to deny respondent tenure and to terminate his employment, whether the complaint was properly dismissed on the pleadings where there are unresolved issues of fact regarding whether petitioners' final decision was made and communicated to respondent within the applicable 300-day limitations period.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 605 F.2d 710. The opinions of the district court (Pet. App. 20a–52a) are unofficially reported at 22 Fair Empl. Prac. Cas. 788.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1979. The petition for a writ of certiorari was filed on December 17, 1979, and was granted on February 19, 1980 (J.A. 102–103). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

INTEREST OF AMICI CURIAE

Petitioners challenge the timeliness of a charge filed with the Equal Employment Opportunity Commission by the plaintiff in a private civil action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Equal Employment Opportunity Commission is the federal agency responsible for administering, interpreting and enforcing federal employment discrimination statutes, including Title VII, and the filing of a timely charge with the Commission is a prerequisite to the Commission's assumption of jurisdiction over it. Moreover, private employment discrimination suits such as this provide the Commission with essential assistance in the enforcement process. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

Adoption of petitioners' view that the statute of limitations runs from the date that an employer signifies the intent to discharge an employee, rather than from the clearly-defined and readily apparent date of actual discharge, would greatly increase the burden on the Commission and the courts, which would be required to determine when an employer's subjective intent to discharge became "final," and when the employee knew (or, perhaps, reasonably should have known) that the employer's decision was "final." In situations such as the present, in which a

statement of the employer's intent to discharge the employee may be tentatively announced up to a year before the employee actually ceases work, the difficulties inherent in ascertaining the point at which a "final" decision is reached would force a prudent employee to interrupt the purely internal decision-making process that ordinarily precedes the discharge of an employee.

For these reasons, petitioners' interpretation would substantially complicate the Commission's enforcement of Title VII.

STATEMENT

The district court in the present case dismissed respondent's complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981,[1] finding the action untimely under both statutes. The court of appeals reversed as to both. Because the case was dismissed on the pleadings, the allegations in the complaint must, for present purposes, be taken as true. See, *e.g.*, *Hospital Bldg. Co.* v. *Rex Hospital Trustees*, 425 U.S. 738, 740 (1976). As it happens, however, many of the pertinent facts are not in dispute.

1. Respondent, who is of Liberian origin (Pet. App. 3a, 21a), was employed as a professor of education by petitioner Delaware State College under a succession of identical one-year contracts running from September 1 through June 30.[2] Under the terms of his appointment to the faculty, respondent was to be considered for tenure following his second year at the college (J.A. 14). In early 1973, respondent was considered for but was denied tenure, and he was given another one-year contract for the

[1] The complaint also alleges jurisdiction under other federal statutes and pendent jurisdiction on a contract claim. On appeal, respondent abandoned all but the Title VII and Section 1981 claims. See Pet. App. 5a.

[2] Copies of these contracts were attached, as Exhibits B through F, to Defendants' Opening Brief in Support of Their Motions for Dismissal and Judgment on the Pleadings, filed in the district court.

1973–1974 academic year (Pet. App. 3a; J.A. 15–16). Respondent alleges that he was falsely and maliciously accused of being a poor teacher and was subjected to interference or harassment in the performance of his duties during the time he was employed by the College, and that he was denied a particular position in 1973 that was given to an "american * * * with fewer qualifications and less experience" (J.A. 16–18).

In February 1974, a faculty committee on tenure and promotions recommended that respondent be denied tenure, and the College's Board of Trustees accepted or endorsed that recommendation in March 1974 (Pet. App. 3a; J.A. 19–21, 52). Respondent alleges that he was not notified of the reasons for the Committee's recommendation and was not, at that stage, afforded the opportunity to present his position in a hearing or otherwise (J.A. 20–21). On April 23, 1974, respondent, through established procedures, requested that the Educational Policy Committee of the Board of Trustees hold a meeting to consider his tenure status, as well as certain conduct by his superiors, the history of his salary arrangements at the College, and other matters (J.A. 50–51). The Committee held a hearing on these matters in May 1974 (J.A. 21).

By letter dated June 26, 1974 (J.A. 52–53), the President of the Board of Trustees informed respondent that the Chairman of the Educational Policy Committee had told him (the President) that a decision on respondent's grievance would not be forthcoming from the Committee until sometime in July.[3] The letter continued:

> In order to comply with the 1971 Trustee Policy Manual and AAUP requirements [4] with regard to the

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[3] Thus, there would appear to be no basis in the record for the court of appeals' statement (Pet. App. 3a–4a) that the Committee determined in May 1974 that the denial of tenure to respondent was proper.

[4] "AAUP" presumably refers to the American Association of University Professors. The AAUP "Standards for Notice of Nonreappointment" provide that such notice, or notice of intention not to recommend reappointment to the governing board, should be given in writ-

> amount of time needed in proper notification of non-reappointment for non-tenured faculty members, the Board has no choice but to follow actions according to its official position prior to the grievance process, and thus, notify you of its intent not to renew your contract at the end of the 1974-75 school year.
>
> Please understand that we have no way of knowing what the outcome of the grievance process may be, and that this action is being taken at this time in order to be consistent with the present formal position of the Board and AAUP time requirements in matters of this kind. Should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board.

On August 16, the President of the College signed the contract for academic year 1973-1974 and delivered it to respondent. Respondent signed the contract on September 4. See Exh. B, note 2, *supra*. That contract, like the contracts respondent had signed for previous academic years, provided that "either party shall notify the other in writing on or before March 1st if his services are not to continue for the school year subsequent to that notice" (*ibid.*).

On September 12, 1974, presumably after it received the recommendation of its Educational Policy Committee, the Board of Trustees notified respondent that it would not reverse the February 21, 1974, denial of tenure (Pet. App. 29a; J.A. 21-22). Respondent was relieved of his teaching responsibilities in October of that year by a person whom respondent alleges was "a less qualified american" (J.A.

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ing "[a]t least twelve months before the expiration of an appointment after [the faculty member has served] two or more years in the institution." American Association of University Professors, *AAUP Policy Documents and Reports* 4, 15 (1977). We are lodging a copy of this compendium with the Clerk of this Court. It appears that the Trustees' Policy Manual, in accordance with the AAUP policy, required that notice of nonreappointment be given to respondent before July 1, 1974.

18).[5] Respondent's Department Chairman assaulted him on December 11, an event which led to the Chairman's conviction on criminal charges and, apparently, to his replacement as Chairman (J.A. 22-23). Respondent alleges that the new Acting Chairman gave him a favorable evaluation on or about January 30, 1975, but that the Academic Dean nevertheless permitted the former Department Chairman to evaluate respondent's conduct on February 5 and concurred in the former Chairman's "wilfully and maliciously given and false" report (*ibid.*). Respondent further alleges that the President of the College failed to inquire into the conduct of the Academic Dean and the former Department Chairman, and that sometime around January 30, 1975, he "reconfirmed the September 12, 1974 decision of the [petitioner] Board of Trustees"[6] in reliance on the former Department Chairman's evaluation (J.A. 22-24).

2. Respondent submitted a charge of discrimination to the EEOC on April 4, 1975, and to the appropriate state agency on April 11, 1975 (Pet. App. 25a-26a & n.8). In each charge, respondent stated that he would "be terminated as a professor of science education" on May 31, 1975 (the scheduled date was actually June 30, 1975 (Pet. App. 22a n.7)), alleged discrimination on the basis of national origin, and requested a complete investigation "[i]f this problem [could not] be resolved before May 31, 1975."[7] The state agency notified respondent by letter dated April

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[5] Petitioners admit that respondent was relieved of his duties, but assert in their answer that respondent agreed to be replaced in one of the courses (J.A. 40).

[6] Respondent alleges that the President of the College (not the President of the Board of Trustees) also "reconfirmed" the Board of Trustees' September 12 decision on or about January 15, 1975 (J.A. 22).

[7] Respondent's charge of discrimination filed with the EEOC is reproduced in Appellant's Appendix in the Court of Appeals, at A-18, and his charge filed with the Delaware Department of Labor is attached as Exhibit A to an affidavit submitted to the district court by respondent along with his Opposition to Defendants' Motion to Dismiss and Judgment on the Pleadings.

28, 1975, that it had waived jurisdiction of his claim to the Baltimore office of the EEOC. Exh. A, note 7, *supra*. EEOC files show that the Baltimore office filed the charge on that date.

Respondent received his "right-to-sue" letter in July 1977, and filed the instant action on September 7, 1977, alleging violations of Title VII and 42 U.S.C. 1981. He alleges in his complaint that the various actions described above had denied him "his right to be free from employment discrimination" in violation of 42 U.S.C. 1981 and 2000e-5 "in that [petitioners] treated [respondent] differently from other faculty members because of his national origin" (J.A. 25). He sought reinstatement and back pay, an award of "tenure and all rights attendant thereto" effective September 30, 1972,[8] and compensatory and punitive damages (J.A. 27-28).

3. The district court concluded that "the alleged violation occurred when the Board of Trustees denied [respondent] tenure and awarded him a terminal contract" (Pet. App. 30a; see also *id.* at 31a, 32a), and dismissed the complaint as untimely because "the complaint affirmatively alleges that the Board of Trustees had decided to deny [respondent] tenure and to award him a terminal contract, and had communicated this to [respondent] by June 26, 1974" (*id.* at 33a). In the district court's view, "the actual termination on June 30, 1975, cannot be considered a separate action" giving rise to a cause of action under Title VII (*id.* at 31a) because the expiration of the terminal contract on that date "simply added nothing to his claim" based on the denial of tenure and award of the terminal contract (*id.* at 32a).

The court also dismissed the count arising under 42 U.S.C. 1981 because it was not filed within three years of June 26, 1974, the period of time allowed by the applicable state statute of limitations. Del. Code Ann. tit. 10, § 8106 (1953). See Pet. App. 34a-36a; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

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[8] Respondent alleges that he first should have been considered for tenure in 1972, not 1973 (J.A. 15).

4. The court of appeals reversed, holding that the period within which a charge must be filed with the EEOC under Titie VII ~~and an action must be filed under Section 1981~~ began to run on June 30, 1975, when respondent's employment with the College was terminated (Pet. App. 1a–17a).

Because it viewed the termination as the critical event for limitations purposes, the court of appeals also held that the Section 1981 claim was timely, because it was filed within three years of June 30, 1975 (Pet. App. 15a–16a).

SUMMARY OF ARGUMENT

I

A. Under Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(e), a person who has initially instituted state proceedings with respect to an alleged unlawful employment practice must file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days "after the alleged unlawful employment practice occurred." In this case, respondent alleges that he was discriminated against on the basis of national origin in connection with his discharge from employment by petitioner Delaware State College on June 30, 1975. Because respondent initially instituted state proceedings with respect to these allegations, he was permitted to file a charge of discrimination with the EEOC at any point up to 300 days after the termination of his employment. Respondent's charge, submitted to the EEOC on April 4, 1975, was filed on April 28, well before this deadline. This conclusion is supported by the decisions of this Court. See, *e.g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234–235 (1976).

B. Petitioners' argument that the limitations period in this case began to run from the time the College finally decided to deny respondent tenure and to terminate his employment, rather than when his employment actually was terminated, is without merit. The tenure and termination decision was only an expression of intent on the part of the College to terminate respondent's employment as of

June 30, 1975. Title VII is concerned with unlawful employment *practices*, not discriminatory intent standing alone. It is therefore consistent with the purposes of Title VII to measure the limitations period from the time an employer carries out a prohibited discharge or other practice, not from the point antecedent in time when the employer formed or communicated the intent to do so.

A denial of tenure may also be an unlawful employment practice in its own right, quite apart from whether the faculty member is later discharged, because of the effect a denial of tenure may have on the faculty member's salary, job security, prestige, or other aspects of the employment relationship. But respondent's complaint concerns more than the effect of the tenure decision on his employment relationship with the College while still employed there. It focuses on the denial of tenure merely as a stage in a process that led to the termination of his employment—a process that also included a notice of nonreappointment, the offer of a terminal year contract, the formal internal review procedure, reevaluation of his performance by the acting department chairman and academic dean, and the eventual discharge. The legislative history of the 1972 amendments to Title VII supports the view that the limitations period begins to run from the final stage in such a process, when the unlawful employment practice is actually carried out.

Petitioners' reliance on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), is misplaced. Here, unlike *Evans*, respondent is challenging his discharge from employment. And that discharge is not an attenuated consequence of an earlier employment practice, as in *Evans;* the discharge is the very eventuality to which the tenure decision, notice of nonreappointment, the terminal year contract, and internal review procedures were directed.

C. The rule petitioners propose—attaching significance to when the employer decides to institute an unlawful employment practice, rather than when he actually carries it out—would create pervasive uncertainty for employees

and employers in Title VII cases. Determining when an employer's decision to engage in an unlawful employment practice became "final" would also create additional threshold issues of fact for the EEOC and the courts in the application of the already complex filing rules under Title VII. There is, moreover, no basis for singling out universities and colleges for a special rule under which the limitations period would begin to run from a point in advance of the date of discharge.

II

Even if the Court were to conclude that the limitations period in this case began to run at some point prior to the date of discharge, dismissal of the complaint for failure to satisfy Title VII limitations requirements was inappropriate.

A. The limitations period applicable in this case was 300 days, not the 180-day period the parties and the courts below assumed. Respondent initially instituted state proceedings by filing a charge with the state agency on April 11, 1975, and the EEOC properly filed respondent's complaint when state proceedings were terminated on April 28, 1975. *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980). Any event occurring within the 300-day period before that date—*i.e.*, on or after July 2, 1975—was within the limitations period.

B. The complaint in the present case, fairly read, alleges that the decision to deny respondent tenure and to terminate his employment was not made until September 12, 1974, at the earliest. It was on that date that the Board of Trustees completed its formal review process and notified respondent that it would not reverse the faculty's recommendation of the previous February that he be denied tenure. This September 12 date was within the 300-day period, as were the dates on which respondent was offered and signed a one-year contract for the final academic year.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY HELD THAT THE LIMITATIONS PERIOD UNDER SECTION 706(e) OF TITLE VII COMMENCED ON JUNE 30, 1975, WHEN RESPONDENT'S EMPLOYMENT WITH THE COLLEGE WAS TERMINATED

A. The Limitations Period In The Case Of An Allegedly Discriminatory Discharge Begins To Run From The Date Of Discharge

Respondent alleges that he was a victim of discrimination on the basis of national origin in connection with his discharge from employment with petitioner Delaware State College.[9] It is undisputed that respondent's employment with the College was terminated on June 30, 1975, upon the expiration of his final one-year contract (Pet. Br. 7; Resp. Br. 4–6; Pet. App. 4a, 22a n.7). It is also undisputed that on April 28, 1975, respondent filed a charge with the EEOC alleging discrimination on the basis of national origin in connection with the anticipated termination of his employment with the College on June 30, 1975 (Pet. Br. 7; Resp. Br. 2 n.1; Pet. App. 4a, 23a). The question presented is whether that charge was timely filed

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[9] Respondent's charges of discrimination filed with the Delaware Department of Labor and the EEOC each stated that he was about to be terminated as a professor, alleged that he was the victim of discrimination on the basis of national origin, and requested a complete investigation if the problem could not be resolved before his scheduled date of termination. See pages 2–6, *supra*. The notice of the charge of discrimination sent to the College by the EEOC on May 2, 1975, indicated that the charge concerned "terms and conditions" of employment and "discharge." Defendants' Opening Brief in Support of their Motions for Dismissal and Judgment on the Pleadings, Exh. A. And respondent alleged in Count II of his complaint in the district court that the actions of petitioners described in Paragraphs 1–48 denied him his right to be free from employment discrimination on the basis of national origin in violation of Title VII and 42 U.S.C. 1981 (J.A. 25). One such action, described in Paragraph 48, is that respondent was "discharged effective June 1, 1975" (J.A. 24) (the actual date of discharge was June 30, 1975).

with the Commission. A straightforward application of the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1 *et seq.*, demonstrates that it was.

Respondent's allegedly discriminatory discharge from employment clearly constituted an allegedly "unlawful employment practice" within the meaning of Section 703(a)(1) of the Act, 42 U.S.C. 2000e–2(a)(1), which provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 706(e) of the Act, 42 U.S.C. 2000e–5(e), in turn provides that a charge of discrimination shall be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred," except that where the person aggrieved has initially instituted proceedings with a state or local agency, "such charge shall be filed * * * within three hundred days after the alleged unlawful employment practice occurred * * *." As explained in point II, *infra*, respondent "initially instituted" proceedings with the appropriate state agency and was therefore permitted to file his charge of discrimination with the EEOC at any point up to 300 days "after the alleged unlawful employment practice occurred." Respondent's charge was filed with the EEOC well before the 300th day following the termination of his employment on June 30, 1975—indeed the charge was submitted to the EEOC before his employment was terminated.[10] It necessarily fol-

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[10] Petitioners note (Pet. Br. 38) that respondent submitted his charge to the EEOC before his employment with the College was actually terminated on June 30, but do not appear to argue that this fact would render the charge invalid if, contrary to its submission in this case, the termination of employment is the relevant date for limitations purposes (compare Pet. App. 13a–14a). That argument would

lows that respondent's charge of discrimination was timely under Section 706(e) of the Act.

This conclusion is consistent with the decisions of this Court, which have been premised on the understanding that a "discharge," within the meaning of Section 706(e), occurs on the date the employee stops work and ceases receiving pay (see, *e.g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234–235 (1976)[11]) and that the applicable limitations period under Section 706(e) in a case

be without merit in any event. If a person aggrieved sends a charge to the EEOC before the date an anticipated unlawful employment practice actually occurs, there is no reason why the EEOC may not properly hold the charge in "suspended animation" (and possibly attempt to avert a violation by informal methods of conciliation) and formally file it after the practice does occur (and after deferral to state procedures, where they are available). *Mohasco Corp.* v. *Silver*, *supra*, slip op. 9; *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972). The limitations periods in Section 706(e) were designed to avoid "the costs associated with processing and defending stale or dormant claims." *Mohasco Corp.* v. *Silver*, *supra*, slip op. 12. There is no reason to believe that Congress was concerned about charges that may be received by the EEOC before the discriminatory practice complained of has been completed.

Moreover, respondent's charge was submitted to the EEOC during a period when some concrete steps had already been taken in a process that was eventually to end with the termination of his employment by the College. Respondent can hardly be faulted for submitting a charge to the EEOC in April of 1975 in the hope of forestalling what had become the substantial likelihood that he would be terminated on June 30.

Finally, respondent's charge of discrimination, in the present setting, subsumed a challenge to the tenure decision itself, whether or not that decision would also result in the termination of his employment with the College. Respondent's charge was plainly not "premature" as respects the denial of tenure. Moreover, once a charge is filed, the Commission may consider acts occurring after the filing that are like or related to the claims asserted in the charge. See, *e.g.*, *Ramirez* v. *National Distillers & Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978). The termination on June 30, 1975, certainly falls in this category.

[11]The Court expressed its approval in *Robbins & Myers* of the common understanding as to when the employee was discharged:

> [The employee] was fired as of October 25, 1971, and all parties so understood. She stopped work and ceased receiving pay and benefits as of that date. * * * Throughout the proceedings * * * both sides appear to have assumed, as did the courts, that the date of discharge was October 25, 1971.

alleging discriminatory discharge commences with the date of actual discharge from employment. 429 U.S. at 234–235; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 (1977) (charge not filed by employee "within 90 days of her separation" not timely under pre-1972 law); *Mohasco Corp.* v. *Silver*, *supra*, slip op. 2, 7; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 455, 463 (1975). See also *Egelston* v. *State University College at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976); *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1328 (4th Cir. 1976); *Krzyzewski* v. *Metropolitan Government of Nashville & Davidson County*, 584 F.2d 802, 806 (6th Cir. 1978); *Greene* v. *Carter Carburetor Co.*, 532 F.2d 125, 126 (8th Cir. 1976).

B. The College's Prior Decision To Deny Respondent Tenure And Terminate His Employment Was Only An Expression Of Intent To Discharge Him And Did Not Trigger The Running Of The Limitations Period

Petitioners nonetheless contend that the limitations period began to run on the date respondent was denied tenure—which they assert was June 26, 1974—not the date on which respondent's employment with the College was terminated. Petitioners suggest, in essence, that the termination of respondent's employment with the College in June 1975, upon the expiration of his contract, was but a consequence of the previous decision to deny him tenure, and that respondent was therefore required to challenge the allegedly discriminatory tenure decision itself within 180 days of when it was made. This argument ignores the nature of the tenure decision and the termination process.[12]

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[12]This argument in support of the district court's dismissal of the complaint has other defects, explained in point II, *infra*. For example, respondent had 300 days, not 180 days, within which to file a charge with the EEOC. Moreover, petitioners' argument is dependent on the factual assertion that the College made a final decision to deny him tenure and offered him a "terminal year" contract on June 26, 1974. But the complaint, fairly read, alleges that the College did not reach a

Stripped of the weighty procedural apparatus and professional delicacy attendant to a denial of tenure, that denial, when coupled with a "notice of nonreappointment,"[13] is nothing more than an expression of a college or university's *intent* to terminate the employment of a faculty member at some point in the future. But Title VII is not primarily concerned with discriminatory intent, standing alone. Section 706(e) prohibits an employer from engaging in an "unlawful employment *practice*" (emphasis added) which, at least in the present context, connotes the carrying out of a discriminatory intent or decision, not its mere formulation. Only when the intent or decision is executed is the employee injured in a concrete fashion[14]—*e.g.*, through loss of a job, pay, or promotion—and only at that point do the remedial provi-

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final decision to deny him tenure until September 12, 1974, at the earliest, and the record reveals that he was not actually offered a one-year contract until August. These August and September dates fell within the applicable 300-day period. The factual dispute presented by the pleadings and limited record in this case would therefore have a significant effect on the outcome of this case even if petitioners' theory of when the limitations period began to run were correct. This factual dispute could not properly be resolved in the context of petitioners' motion to dismiss the complaint and judgment on the pleadings.

[13]A decision to deny a faculty member tenure need not be accompanied by a decision to terminate the faculty member's employment, as evidenced in the case by the College's decision in 1973 not to grant respondent tenure but instead to offer him another one-year contract and to reconsider him for tenure the following year (Pet. App. 3a; J.A. 15–16).

[14]This case does not involve allegations that the employer has a discriminatory policy that may have an impact on a number of employees, as where it may be alleged that an employer has a uniform policy of not promoting blacks. Such a policy may have the effect of deterring black employees from even applying for a promotion. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 365–367 (1977). In that type of case, the policy constitutes more than a bare intent to discriminate; it has a concrete impact on the affected employees, in terms of positions and wages foregone, even though the employer has not had occasion to apply that policy to each of them on an individualized basis in considering requests for promotion. Accordingly, the policy itself is an "unlawful employment practice" in viola-

sions of Title VII have real significance.[15] It is therefore consistent with the structure and purposes of Title VII to measure the limitations period from the date the employer carried out the discharge or other employment "practice" in question, not from the point antecedent in time when the employer formed or communicated his intent to do so. Under this analysis, the 300-day limitations period for the filing of respondent's charge respecting his allegedly discriminatory discharge began to run on June 30, 1975, when his employment with the College was terminated.

There is no basis for departing from that general rule here merely because the College's own contractual provisions or internal procedures provide that a decision to discharge an employee be made at a particular time or in a particular way. This Court has emphasized that the statutory rights under Title VII are independent of the employee's contractual rights and that the limitations provisions in Title VII are not controlled by private contract rights. *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

We do not mean to suggest, of course, that a denial of tenure to a college faculty member may not also be an "unlawful employment practice" under Section 703(a)(1) in its own right, quite apart from the discharge from em-

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tion of Title VII. See Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 826–831 (1979). An unexecuted intent to discharge an individual employee, as in this case, does not have a similarly immediate impact.

This case also does not concern allegations that the College expressed an intent to discharge respondent for the purpose of *threatening* him and thereby to affect his employment relationship while he was still working for the College. Such a threat, if discriminatory, would itself constitute an "unlawful employment practice" affecting conditions of employment, whether or not it was ever carried out.

[15] Section 706(g), 42 U.S.C. 2000e–5(g), provides that the court may order "reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate." The relief expressly mentioned in the section is tailored to remedying injuries already sustained.

ployment that often follows. Tenured status is certainly a "term," "condition," or "privilege" of employment within the meaning of that Section which can significantly affect the faculty member's job security, prestige, and compensation. Accordingly, if respondent believed that he was discriminated against on the basis of national origin when the College declined to grant him tenure in the spring of 1973 and gave him another one-year contract, he could have filed a charge with the EEOC at that time despite the absence of any specific intent on the part of the College to terminate his employment. Similarly, he could have filed a charge of discrimination based on the denial of tenure in 1974, standing alone, because of the manner in which it may have affected his on-going employment relationship with the College.

But the gravamen of respondent's complaint in the present case goes beyond the terms and conditions of his employment. His complaint focuses on the denial of tenure merely as a stage in the process that led to his discharge from employment—a process that also included the notice of nonreappointment, the offer of a "terminal" one-year contract, exhaustion of the formal internal review procedure, reevaluation of his performance in January by the acting department chairman and academic dean, and the eventual termination of his employment on June 30, 1975. The discharge was not accomplished until the latter date, after the termination process just described was completed.[16]

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[16] As explained in point II, *infra*, the allegations in the complaint indicate that the Board of Trustees did not finally decide to deny respondent tenure until September 12, 1974, when the Board notified respondent that it had accepted the Educational Policy Committee's recommendation that respondent be denied tenure. This was within the 300-day limitations period applicable in this case. Thus, there is no occasion to consider in this case what relief the district court could grant with respect to the denial of tenure if it did not occur within the limitations period, even though the discharge was within that period. Consideration of appropriate relief would be premature in any event, since no finding of liability has been made.

As noted in the text, however, Congress plainly intended that in some instances, the limitations period should be measured from the

Consequently, petitioners' characterization of the court of appeals' treatment of the facts as a "continuing violation" is erroneous. The court of appeals expressly declined to rely on a "continuing violation" theory. The court noted instead that "it is only alleged that the *process of termination* itself was a continuing one" (Pet. App. 15a; emphasis added). In contrast, the alleged "unlawful employment practice"—respondent's discriminatory discharge—was a discrete event, albeit one preceded by a process of termination. The violation complained of was not even completed until respondent's employment was terminated in June 1975, and the limitations period was not intended to begin to run until that time.

Moreover, even if the violation complained of here could fairly be characterized as a "continuing violation," the Section-by-Section Analysis of the 1972 Amendments to Title VII makes clear that the limitations period in Section 706(e) is to be measured from the final discriminatory event:

> Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which was [*sic*] determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.[17]

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last in a series of related discriminatory occurrences. The denial of tenure and eventual termination, along with intervening steps in the discharge process, would appear to be sufficiently related for these purposes. In any event, the court, as an incident to ordering respondent reinstated, could presumably order that he not be discharged without a tenure review.

[17]This statement in the Section-by-Section Analysis apparently refers to situations in which a particular "unlawful employment practice"

118 Cong. Rec. 7167, 7564 (1972), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1846 (Comm. Print 1972) (hereinafter "*Leg. Hist.*").[18] Since the final event controls for limitations purposes in the context of a "continuing violation," a fortiori, where, as here, the alleged "unlawful employment practice"—respondent's discharge—is not a continuing one, but a discrete event preceded by a process of termination, it is clear that Congress intended the limitations period to begin to run only when the discharge was complete. In short, petitioners' construction of the limitations period of Section 706(e) contravenes the express congressional intent to give the respondent "the maximum benefit of the law."

Finally, petitioners' reliance on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), is misplaced. There, an employee, who declined to file a charge of discrimination with the EEOC in 1968 when she was fired for allegedly discriminatory reasons, was rehired in 1972, but was not credited with seniority for her previous service. The employee then filed a charge with the EEOC. She could not challenge her 1968 discharge, because the then applicable 90-day limitations period following that event had long since passed. She argued instead that the refusal to credit her with seniority after 1972 for her previous service was a continuing violation of Title VII. The Court rejected this argument, finding that although the 1968 discharge (which was complete in 1968) had a continuing *effect* on her, there was no continuing *violation* because the seniority plan itself was neutral in operation. Here, in contrast, re-

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is complete in the sense that it is having a concrete impact on an individual in the form of lost wages or position, even though the practice and its effect may continue over a period of time. See Jackson & Matheson, *supra*, 67 Geo. L. J. at 824-825.

[18] The statue itself reinforces this analysis, for although charges must be filed within 180 or 300 days, monetary relief is available under Section 706(g) for the two-year period preceding the filing. 42 U.S.C. 2000e-5(g).

spondent is challenging his discharge as an act of intentional discrimination within the applicable time periods. The discharge, which did not occur until June 30, 1975, when he left the college, was not an attenuated consequence of an earlier employment practice, as in *Evans;* it was the very eventuality to which the tenure decision, the "notice of nonreappointment," the terminal year contract and the internal review process were directed.

C. The Rule Petitioners Suggest Would Create Considerable Uncertainty And Additional Factual Issues Regarding The Application Of The Already Complex Filing Rules Under Title VII

The rule petitioners suggest would have disturbing ramifications if applied in Title VII cases generally. It is relatively common for an employer to give an employee notice of his termination several days, weeks, or months in advance. Under petitioners' theory, the 180 or 300-day limitations period under Title VII would begin to run when that notice is received, not on the employee's last day of work, because actual termination would be but a "neutral consequence" of the employer's decision to fire him. Such a result would be contrary to the common sense view—and no doubt the shared understanding of most employers and employees (see, *e.g., Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 234–235)—of when a discharge occurs. It would also be contrary to the decisions of this Court indicating that the limitations period runs from the date the employee ceases work (see page 13, *supra*).

The problems presented by petitioners' argument would be especially pronounced where the employer does not give the employee formal written notice, but instead informs him orally (or the employee learns through the grapevine) of the decision to fire him. How is the employee to know when this decision is "final"? The simplest point of reference, we submit, is when the employee actually ceases work. Until that point, as the court of appeals observed (Pet. App. 7a), the employee may often have rea-

son to believe that the employer will change his mind or that other forces will intercede to prevent the termination.

Moreover, the difficulties presented by petitioners' argument are not confined to situations of allegedly discriminatory discharges; they could arise with regard to any promotion, transfer, or other personnel action where the employer's decision to take the action preceded its execution. Petitioners' position, if applied generally, would therefore create pervasive uncertainty for employers and employees and additional threshold issues of fact to be resolved by the EEOC and the courts in determining the timeliness of complaints under the already complex filing rules set forth in Title VII.

In contrast, the rule adopted by the court of appeals, focusing on the date of discharge, "provides a bright line guide both for the courts and for the victims of discrimination" (Pet. App. 11a; footnote omitted). Petitioners contend that a decision to deny one tenured status is also a clear, identifiable, and discrete act which a lay person can understand and act upon. But, as our discussion in point II demonstrates, it is anything but clear in this case when the College made and communicated a "final" decision to deny respondent tenure and to terminate his employment as of June 30, 1975. Amicus AAUP represents that its recommended procedures for a formal internal review of tenure decisions and notices of nonreappointment are reflected in the internal regulations of hundreds of colleges and universities (Br. 10). Consequently, factual issues similar to those discussed in point II can be expected to arise in Title VII cases in the university setting generally.

Nor have petitioners advanced any reasons (and we can think of none) why a special rule should be fashioned for colleges and universities, under which some event prior to the date of discharge would trigger the commencement of the limitations period in Section 706(e). The legislative history of the 1972 amendments to Title VII, when the exemption for educational institutions contained in the

Civil Rights Act of 1964 was repealed,[19] does not support such a special rule. Congress repealed the exemption for educational institutions because it found discrimination against minorities and women in the field of education to be "as pervasive as discrimination in any other area of employment" and in "especially critical" need of correction (H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19-20 (1971), *Leg. Hist.* 79-80). And Congress believed it to be "essential that [employees of educational institutions] be given the same opportunity to redress their grievances as are available to other employees in the other sectors of business" (S. Rep. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971), *Leg. Hist.* 420-421).

To be sure, notice of termination is given further in advance in the college or university setting than typically might be the case elsewhere. But this is a difference of degree, not substance, because advance notice is given for the same *reasons* in the college and university setting as elsewhere: to provide enough time for the employee to secure another position. See "The Standards for Notice of Nonreappointment," *AAUP Policy Documents and Reports*, 13 (1977). The point at which educational institutions provide notice of intended termination is largely attributable to the structured hiring process and academic year calendar that most such institutions follow. But, as we have pointed out, it is not apparent why a contract of employment specially tailored to meet an industry's needs or an employer's own internal decision-making and notice policies should affect the meaning of the term "discharge" as used in Title VII or the settled rule of when the limitations period begins to run in the case of an allegedly discriminatory discharge.[20]

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[19] The exemption for educational institutions contained in Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, was deleted by Section 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[20] The fact that college faculty members are employed under a series of one-year contracts does not warrant a special rule. The contracts involved in the present case, for example, contemplated a continuing employment relationship, because they provided that either party was

Indeed, a rule focusing on the time at which the employer makes and communicates a decision to discharge an employee would be especially inappropriate in the college and university setting precisely because of the period of months that may elapse between the time of notice and actual termination. It would not be uncommon for a faculty member to do what respondent allegedly did in this case: to exhaust all formal and informal review processes within the institution, to request reconsideration and plead for mercy or delay, and to invoke outside legal remedies only near the end of the academic year when it became likely that the college would in fact go forward with its intended termination. If petitioners' rule were applied in other industries, where a shorter time generally elapses between the time the employer expresses an intent to discharge an employee and when he actually does so, an employee who resorted to these measures before being terminated would probably have a substantial portion of the 180 or 300-day period remaining after his discharge within which to invoke the protection of Title VII. But in the university setting, the faculty member who resorted to the evidently more protracted internal review process and other measures in an effort to obtain reconsideration might often find that the limitations period had run by the time it became apparent that internal efforts would not prevent the discharge. This would be particularly so in a state where there was no antidiscrimination agency and where the faculty member therefore had only 180 days within which to file a charge with the EEOC. Such a trap for the unwary faculty member would be particularly inappropriate in view of Congress's express concern for discrimination in educational institutions, when it enacted the 1972 amendments to Title VII.

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to notify the other before March 1st "if [respondent's] services are not to *continue* for the school year subsequent to that notice." Exhs. B-F, note 2, *supra* (emphasis added). The AAUP's "Standards for Notice of Nonreappointment" also state that "a probationary appointment, even though for a fixed or stated term, carries an expectation of renewal * * *." *AAUP Policy Documents and Reports*, *supra*, at 13.

II

DISMISSAL OF THE TITLE VII CLAIM WAS INAPPROPRIATE EVEN ON PETITIONERS' THEORY THAT THE LIMITATIONS PERIOD BEGAN TO RUN WHEN TENURE WAS DENIED

A. Respondent Was Entitled To A Period Of 300 Days Within Which To File A Charge Of Discrimination, Not The 180-Day Period The Parties And The Courts Below Assumed To Be Applicable

Both petitioners and respondent have briefed this case, and both courts below decided it, on the assumption that under Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), respondent had only 180 days from the date of the alleged discriminatory occurrence within which to file a charge of discrimination with the EEOC (Pet. Br. 12, 14, 25-26, 34-35, 37-38, 42, 45, 49; Resp. Br. 6, 9; Pet. App. 5a-7a, 12a-13a, 16a, 26a-28a, 33a). This assumption is in error.

Under Section 706(e), a person aggrieved by an unlawful discrimination practice has 300 days to file a charge of discrimination with the EEOC if he "initially instituted" proceedings with a state or local agency with authority to grant or seek relief from that practice. *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 2, 7-9.[21] Sec-

[21] Delaware law requires that a charge of discrimination must be filed with the Department of Labor within 90 days after the alleged unlawful discrimination practice or 120 days after the discovery thereof, whichever is later. Del. Code Ann. tit. 19, § 712(d) (Supp. 1972). It is not clear how this state limitations provision would be applied to the facts of this case, although we note that the "waiver" of jurisdiction by the Department has been held to indicate that it in fact *exercised* jurisdiction in a matter. See *EEOC* v. *Delaware Trust Co.*, 416 F. Supp. 1040, 1044 (D. Del. 1976). However that may be, Congress did not require that a charge be filed with the state agency within any specific period of time after the alleged discriminatory occurrence—including within the period provided under the state statute of limitations—as a condition to invoking the 300-day limitations period for filing with the EEOC in deferral states. *Mohasco Corp.* v. *Silver*, *supra*, slip op. 6 n.16, 8 n.19; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758-764 (1979).

tion 706(c) of the Act in turn provides that the charge of discrimination may not be filed with the EEOC until the state agency has had a period of up to 60 days to consider and attempt to resolve the dispute. 42 U.S.C. 2000e-5(c). However, if the person aggrieved sends his charge of discrimination to the EEOC before he has instituted state proceedings, the EEOC may hold the complaint in "suspended animation" and then automatically file it with the EEOC upon the end of the 60-day deferral period or at such earlier time as the state agency terminates its proceedings. *Mohasco Corp.* v. *Silver*, *supra*, slip op. 9; *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972). Thus, in the present case, after the EEOC received respondent's charge of discrimination on April 4, 1975, that charge was properly held by the EEOC in "suspended animation" until respondent instituted proceedings with the Delaware Department of Labor on April 11, 1975, and until the Department of Labor terminated its proceedings on April 28, 1975, by waiving jurisdiction over the subject matter of the complaint. On the latter date, respondent's charge of discrimination automatically was deemed filed with the EEOC for limitations purposes. 29 C.F.R. 1601.12(b)(1)(iii) and (iv) (1975); See also 29 C.F.R. 1601.13(d)(2)(iv) (1979). Any alleged discriminatory occurrence during the 300-day period preceding April 28—*i.e.*, any event occurring on or after July 2, 1974—would therefore be within the applicable limitations period.

B. There Are Unresolved Issues Of Fact Regarding Whether The "Final" Decision To Deny Respondent Tenure And To Terminate His Employment Occurred Within The 300-Day Period

Application of the 300-day, rather than the 180-day, limitations period to the facts of this case would be of considerable significance if the Court were to reject the court of appeals' conclusion, and our argument in point I, *supra*, that the limitations period under Title VII began to run when respondent's employment with the university was terminated on June 30, 1975. The district court stated, for

example, that "the alleged violation occurred when the Board of Trustees denied [respondent] tenure *and awarded him a terminal contract*" (Pet. App. 30a; emphasis added; see also *id.* at 31a). The district court notes that the Board had decided to deny respondent tenure and award him a terminal contract by June 26, 1974. But whenever the Board *decided* to award respondent a new one-year contract, it did not actually *offer* him the contract until August 16, 1974, and respondent did not sign it until September 4. These dates were well within the 300-day limitations period preceding April 28, 1975.

The date on which the contract was offered by the College takes on even more significance when it is noticed that respondent's contract for each of the three preceding academic years had been signed by the President of the Board of Trustees on April 1. Exhs. D–F, note 2, *supra*. The fact that the President did not sign the contract for the 1974–1975 academic year on April 1, 1974—which was after the Board's alleged acceptance in March of the faculty committee's recommendation to deny respondent tenure (Pet. App. 3a; J.A. 19–21)—strongly implies that the Board had not even finally decided by June 26 to offer respondent a terminal contract.

Even if the denial of tenure alone were the date from which the limitations period began to run, as petitioners urge, a fair reading of the complaint raises a genuine issue of fact as to whether the College actually denied respondent tenure before September 12, 1974, when it notified him that it was not altering its decision of the previous spring. This date is also well within the 300-day limitations period.[22] The language of the June 26 letter from the President of the Board of Trustees notifying respondent of his nonreappointment after the 1974–1975 academic year, for example, indicates that it was sent solely

[22] Respondent alleges, for example, that the September 12 letter to him at the conclusion of the grievance process stated that the Board "would not reverse the February 21, 1974 denial of tenure" (J.A. 21). The latter was the date on which the faculty committee recommended against tenure (J.A. 20), not the date on which the Board allegedly accepted the recommendation, which was in March (*ibid.*).

23/ See next page for footnote.

to ensure technical compliance with College and AAUP procedural requirements in the event it should later decide to abide by its initial acceptance in March of the faculty committee's recommendation to deny respondent tenure, not because the Board had reached a considered and final judgment on the tenure decision. The letter states that the Board had "no way of knowing" what the outcome of the grievance process might be, and that a favorable recommendation by the Educational Policy Committee, if accepted, would "of course * * * supersede any previous action taken by the Board" (see page 4, *supra*). This language implies that the Board itself viewed its March decision respecting respondent's tenure to be tentative as of June 26—and perhaps merely a pro forma ratification of the faculty's recommendation pending more thorough consideration in the Board's review process triggered by respondent.[23] The delay in offering respondent a new one-year contract until August[24]—after the July date on which the Educational Policy Committee was scheduled to make its report to the Board on respondent's grievance[25]—also suggests that the Board's position was at most tentative.[26]

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[23] This date is also within the three-year limitation period for the count arising under 42 U.S.C. 1981.

[24] The record does not disclose when the Committee actually made its recommendation.

[25] The contract respondent signed for the 1974–1975 academic year, although frequently referred to in this case as a terminal contract, was identical in form to those signed in previous years. It stated that he would be notified by the following March 1st if his services would not continue for the subsequent school year. This language in the contract implies that a final decision had not been made to terminate respondent's employment (although this provision may have been but the unintended result of using a form contract). The September 12 letter notifying respondent that the decision denying him tenure would not be reversed might have constituted sufficient notice under the contract. This matter could also be explored on remand.

[26] It is also noteworthy that respondent alleges that the President of the College, in January 1975, reconfirmed the September 12 decision of the Board (J.A. 22–23), not a decision of June 26 or of some time in March. Accepting this allegation as true, as we must, the President of the College seems to have viewed the September 12 letter to embody the Board's tenure decision.

Finally, respondent was allegedly not furnished with reasons for the denial of tenure or afforded an opportunity to be heard on that denial until the Educational Policy Committee conducted a hearing in May (J.A. 20–21), after the Board had first accepted the faculty committee's recommendation. The courts should not lightly assume that this formal review process, with its procedural protections, was an empty gesture. The President of the College had informed respondent of the existence of this review process on March 30, 1974, presumably with the understanding that the review would be meaningful (J.A. 41). Moreover, as amicus AAUP notes (Br. 9–10), the AAUP has formulated model procedures to be followed by colleges and universities in situations in which an instructor or professor who is denied tenure asserts that the initial decision denying tenure resulted from inadequate consideration by the faculty committee, was violative of academic freedom, or constituted discrimination on the basis of race, sex, religion or national origin. *AAUP Policy Documents and Reports*, *supra*, at 11–12, 19–21; see *Board of Regents* v. *Roth*, 408 U.S. 564, 579 n.17 (1972). The tenor of the AAUP provisions is that a tenure decision that follows a faculty committee's recommendation against tenure merely shifts the burden to the faculty member to trigger a fresh review by a different body in a formal review process. This "common law" of the educational community (*Perry* v. *Sindermann*, 408 U.S. 593, 602 (1972), quoting *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 579 (1960)), reflected in the AAUP policies that the College acknowledges it follows in other respects (J.A. 53), reinforces the view that the June 26 notice to respondent was not final.

The formal review process included here is wholly unlike that at issue in *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, relied upon by petitioners (Pet. Br. 37) for the proposition that resort to grievance procedures does not toll the running of the statute of limitations or render the June 26 notice to respondent non-final. In *Robbins & Myers, Inc.*, grievance procedures were pursued after the complainant "stopped work and ceased receiving pay and

benefits"; unless the grievance procedures resulted in reinstatement she was not "entitled to be paid for the period during which the grievance procedures were being implemented." 429 U.S. at 234–235. There was also no indication that either party viewed the discharge itself as "anything other than 'final.'" *Id.* at 235. Here, in contrast, respondent was still employed and being paid by the College when he pursued the formal review process, and it does not seem that either party viewed the June 26 notification of nonreappointment as final. This, therefore, would appear to be a situation in which the parties operate pursuant to an arrangement "under which management's ultimate adoption of a * * * recommendation"—here the recommendation of the Board's Educational Policy Committee—"would be deemed the relevant statutory 'occurrence' " with respect to the denial of tenure. *Id.* at 234.[27]

At the very least, respondent may have had a reasonable expectation that the notice of nonreappointment in the letter of June 26 was not to be considered final, in view of the nature of the initial tenure decision and the subsequent review process, the President's suggestion in March that respondent pursue the grievance procedure, the hearing in May, the tone of the letter in June, the delay in offering the contract, and the Board's September 12 notice to him. The College's understanding of the nature of the initial tenure decision and review process, perhaps based on their form rather than their substance, would not be dispositive. See *Electrical Workers* v. *Robbins & Myers, Inc., supra,* 429 U.S. at 234–235; cf. *Perry* v. *Sindermann, supra,* 408 U.S. at 599–603.

Thus, there are strong indications in the record that the formal review process respecting the denial of tenure was not actually completed until September 12, 1979. Accordingly, even if the Court were to conclude that the lim-

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[27] Here, moreover, the final review process was conducted solely by management, through its Board of Trustees. In *Robbins & Myers, Inc.*, the contractual grievance procedure had progressed beyond the stage at which management had taken its final unilateral action.

itations period began to run before respondent's employment was terminated on June 30, 1975, respondent should be given the opportunity on remand to establish that the College did not in fact reach a "final" decision to deny him tenure and terminate his employment (and notify him of that decision) until sometime after July 2, 1974—within the applicable 300-day period. This was, in fact, the very approach followed by the Ninth Circuit in *Abramson* v. *University of Hawaii*, 594 F.2d 202 (1979), relied upon by petitioners here (Pet. Br. 33–34) for the proposition that the expiration of the terminal contract on June 30, 1975, was not the pertinent date for limitations purposes. Although the court in *Abramson* did indicate, contrary to the Third Circuit here, that the limitations period began to run before the faculty member terminated his employment, the Ninth Circuit nevertheless declined to rely solely on a notice of denial of tenure given to the faculty member in the June preceding the final academic year as the *final* decision in this regard (594 F.2d at 210):

> Appellant Abramson asserts that the University at all relevant levels regularly reviews tenure decisions during the terminal year. She offered to prove at least three instances in which faculty members who were originally denied tenure were reconsidered and granted tenure during their terminal years. The guidelines do not preclude explicitly such reconsideration. Moreover the record suggests the possibility that the June 30 deadline for notification was complied with in appellant's case to avoid an automatic tenure grant, rather than as the final step in appellant's consideration process. * * *
>
> * * * Appellant has demonstrated the existence of a genuine issue of material fact. She should have an opportunity to demonstrate that the ordinary and generally accepted tenure decision process included a review of reconsideration requests in the final year and that in her case the decision of the President in May, 1972 to refuse to review her tenure denial constituted discrimination against her on the basis of sex.

Respondent should be given the same opportunity here, even if, contrary to our submission, the limitations period began to run before his employment was terminated.

CONCLUSION

For the reasons stated in point I of this brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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